TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1940~~ 1941

No. ~~536~~ 45

THE UNITED STATES OF AMERICA, PETITIONER

vs.

ALICE GRAY KALES

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 8, 1941
CERTIORARI GRANTED APRIL 28, 1941

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 826

THE UNITED STATES OF AMERICA, PETITIONER

vs.

ALICE GRAY KALES

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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1 In United States District Court for the Eastern District of Michigan, Southern Division

No. 14394

ALICE GRAY KALES, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

Calendar entries

1936

July 7—Petition for return of Income Taxes filed. (Clerk's fees $5.00.)

July 20—Proof of service on The Attorney General, filed.

July 20—Proof of service on United States Attorney, filed.

July 9—Special Appearance of United States Attorney, filed.

Sept. 28—Motion to strike allegations in paragraph 3 (j) of Petitioner's Petition, filed.

Sept. 28—Motion to make more definite and certain, Allegations in paragraph 3 (g) and 3 (h), filed.

Sept. 28—Notice of Hearing on motion to make more definite and certain, and motion to Strike, October 19, 1936, filed.

Oct. 19—Order granting Motion to make more definite and certain, filed and entered—O'Brien J.

Oct. 19—Order granting Motion to strike, filed and entered—O'Brien J.

Nov. 2—Amended Petition filed.

Dec. 4—Motion to Dismiss, Notice of Hearing—January 11, 1937, filed. (Clerk's fees $5.00.)

2 1937

Jan. 14—Affidavit in opposition to Motion to Dismiss filed.

Jan. 16—Hearing on Motion to Dismiss, Arguments of Counsel, Case taken under advisement—O'Brien J.

1939

Feb. 18—Opinion of the Court filed—O'Brien J.

Feb. 27—Order of Dismissal filed and entered—O'Brien J.

May 3—Notice of Appeal filed. (Clerk's fees $5.00.)

May 3—Bond on Appeal, filed.

May 4—Proof of Mailing Notice of Appeal, filed.

May 4—Appellants Designation of Contents of Record on Appeal and Statement of Points to be Relied upon, filed.

June 1—Stipulation Re Abridgment of Transcript of Record and Waiver of Comparison, filed.

In United States District Court

Petition

Filed July 7, 1936

To the Honorable, the Judges of the District Court of the United States for the Eastern District of Michigan, Southern Division:

Alice Gray Kales brings this her petition against the United States of America, pursuant to the provisions of Section 1122 of the Revenue Act of 1926, re-enacting the paragraph added by Section 1310 of the Revenue Act of 1921 at the end of Paragraph Twentieth of Section 24 of the Judicial Code, relating to the jurisdiction of District Courts as amended, and respectfully represents unto the Court and alleges that:

"(The original Petition has been abridged in accordance with District Court Rule 75 (e) to avoid duplication. Paragraphs 1, 2, 3 (a) to 3 (f), inclusive, 3 (h), 3 (i), 3 (k) to 3 (o), inclusive, 4 and 5, are the same as the corresponding numbered paragraphs of the Amended Petition which is set forth in full (Record pages 12 to 38) with the exception of the references to the exhibits. Exhibit A of the original Petition is the same as Exhibit A of the Amended Petition but two additional exhibits (B and C) were added to the Amended Petition in accordance with the Court's order of October 19, 1936, granting defendant's motion to make more definite and certain. Hence Exhibits B to J inclusive of the Original Petition correspond to and are the same as Exhibits D to L of the Amended Petition.

"Paragraph 3 (g) of the original Petition is the same as the first paragraph of Paragraph 3 (g) of the Amended Petition. Paragraph 3 (j) of the original Petition is set forth in full in defendant's Motion to Strike" (Record page 7).

Wherefore, Petitioner claims judgment against the defendant in the sum of One Hundred Ninety-five Thousand Seven Hundred Ten and 44/100ths ($195,710.44) Dollars, with interest thereon as provided by law.

ALICE G. KALES.

BEAUMONT, SMITH & HARRIS,
Attorneys for the Plaintiff,
2900 Union Guardian Bldg., Detroit, Michigan.

[*Duly sworn to by Alice G. Kales; jurat omitted in printing.*]

4 In United States District Court

Special appearance

Filed July 9, 1936

To the CLERK OF SAID COURT.

Now comes the United States of America, defendant herein, by John C. Lehr, United States Attorney for the Eastern District of Michigan, and Charles B. W. Aldrich, Assistant United States Attorney for said district, and appears specially in the above entitled cause.

JOHN C. LEHR,
United States Attorney.
CHARLES B. W. ALDRICH,
Assistant United States Attorney.

To BEAUMONT, SMITH & HARRIS,
2900 Union Guardian Building, Detroit, Michigan, Attorneys for Plaintiff:

Please take notice that the undersigned have this day appeared specially for the United States of America, defendant in the above entitled cause.

JOHN C. LEHR,
United States Attorney.
CHARLES B. W. ALDRICH,
Assistant United States Attorney.

Dated July 8, 1936.

5 In United States District Court

Proof of service of petition on Attorney General of the United States

Filed July 20, 1936

STATE OF MICHIGAN,
County of Wayne, ss:

William F. Kikhoefel, being first duly sworn, deposes and says that he is a resident of the City of Detroit; that on the 7th day of July, 1936, he mailed a true copy of plaintiff's petition in the above entitled cause to the Attorney General of the United States by registered letter by depositing said petition in the United States Post Office at Detroit, Michigan, registered mail, enclosed in a sealed envelope with legal postage thereon fully prepaid, and

addressed "The Attorney General, Department of Justice, Washington, D. C."

Further deponent saith not.

WILLIAM F. KIKHOEFEL.

Subscribed and sworn to before me this 18th day of July A. D. 1936.

FRANK E. COOPER,
Notary Public, Wayne County, Michigan.

My commission expires August 16, 1938.

6 In United States District Court

Proof of service of petition on United States Attorney

Filed July 20, 1936

STATE OF MICHIGAN,
County of Wayne, ss:

Laurence A. Masselink, being first duly sworn, deposes and says that on the 7th day of July A. D. 1936, he personally served a true copy of plaintiff's petition in the above entitled cause upon John C. Lehr, United States Attorney in the District wherein the above suit is brought, by personally handing the same during business hours to Charles B. W. Aldrich, Assistant United States Attorney, who was then and there in charge of the civil matters of the United States Attorney's office for the Eastern District of Michigan.

LAURENCE A. MASSELINK.

Subscribed and sworn to before me this 14th day of July A. D. 1936.

FRANK E. COOPER,
Notary Public, Wayne County, Michigan.

My commission expires August 16, 1938.

7 In United States District Court

Motion to strike

Filed September 28, 1936

Now comes the defendant, the United States of America, by John C. Lehr, United States Attorney, and respectfully moves the Court that the following allegations be stricken from the petitioner's petition:

All of the allegations contained in paragraph 3 (j) in said petition, reading as follows:

"Deficiencies were also asserted against other stockholders of the Ford Motor Company, who had sold their stock in 1919 for Twelve Thousand Five Hundred and no 100ths ($12,500.00) Dollars per share and who had also reported the profit derived thereon by using Nine Thousand Four Hundred Eighty-nine and 34 100ths ($9,489.34) Dollars as the March 1, 1913, value of said stock. These stockholders petitioned the United States Board of Tax Appeals for a redetermination of their 1919 income taxes and on, to-wit, May 5, 1928, in the case of James Couzens v. Commissioner, 11 B. T. A. 1040, the Board of Tax Appeals, an independent agency in the executive branch of the Government, determined that the fair market value of the Ford Motor Company stock on March 1, 1913, was Ten Thousand and no 100ths ($10,000.00) Dollars per share and this determination was thereafter followed in the cases of Rosetta V. Hauss v. Commissioner, 12 B. T. A. 755; Paul R. Gray v. Commissioner, 12 B. T. A. 916; Luman W. Goodenough, Executor and Trustee under Will of Philip H. Gray v. Commissioner, 12 B. T. A. 935; David Gray v. Commissioner, 12 B. T. A. 956; Horace H. Rackham v. Commissioner, 12 B. T. A. 1085; John W. Anderson v. Commissioner, 12 B. T. A. 1111; Estate of John F. Dodge v. Commissioner, 13 B. T. A. 201; and Anna T. Dodge, et al. Executors v. Commissioner, 13 B. T. A. 223. No appeals were ever taken from said decisions of the Board of Tax Appeals and petitioner is informed and believes that refunds were made by the United States to James Couzens, Rosetta V. Hauss, the Estate of John F. Dodge, Anna T. Dodge, et al. Executors, Horace H. Rackham, and John W. Anderson, based on the Ten Thousand and no 100ths ($10,000.00) Dollars March 1, 1913, value of the Ford Motor Company stock."

The said allegations comprising paragraph 3 (j) of the petitioner's petition are irrelevant, immaterial, redundant, and frivolous, since they refer to proceedings between parties entirely foreign to this proceeding and neither the petitioner nor the defendant in this proceeding were parties litigant in the proceedings referred to.

Wherefore, defendant moves the Court that said allegations comprising paragraph 3 (j) of the petitioner's petition be stricken.

In the event that this motion is overruled, defendant respectfully requests that an exception be allowed to it.

JOHN C. LEHR,
United States Attorney.

DAVID A. WOLFF,
Assistant United States Attorney.

9 In United States District Court

Motion to make more definite and certain

Filed September 28, 1936

Now comes the defendant, the United States of America, by John C. Lehr, United States Attorney, and moves that the petitioner herein be required to make her petition more definite and certain in order that the defendant may be informed as to the basis of the petitioner's alleged cause of action, and in order that defendant may be able to plead in response to petitioner's petition, which it is not in a position to do at this time owing to the failure of the petitioner in its petition to appraise the defendant of the facts.

The particular allegations in the petitioner's petition which the defendant moves the petitioner be required to make more definite and certain are as follows:

In paragraph 3 (g) of her petition, the petitioner alleges, "Thereafter, on March 24, 1925, petitioner paid said jeopardy assessment to Collector Fred L. Woodworth under written protest. On the same date, petitioner caused a duplicate of said written protest to be presented to the Commissioner of Internal Revenue."

In paragraph 3 (h) of her petition, petitioner alleges that, "At the time of filing and presenting said written protest, as aforesaid, petitioner included therein and filed with the Collector of Internal Revenue at Detroit, Michigan, and also with the Commissioner of Internal Revenue, a claim for refund * * *. Said claim for refund was duly filed on March 24, 1925, * * *."

Petitioner failed to attach to her petition as an exhibit said protest or claim for refund alleged by the petition, although numerous exhibits of other documents are attached to said petition.

It is, therefore, respectfully requested that petitioner be required to attach to her petition an exact copy of said protest and claim for refund, or that their exact contents be recited in the petition.

Petitioner has failed to allege any facts in respect to what action, if any, was taken by the Bureau of Internal Revenue upon said protest alleged to have been made under date of
10 March 24, 1925, to the Bureau of Internal Revenue, and has also failed to attach to her petition as an exhibit any communication from the Bureau of Internal Revenue showing what action, if any, was taken by the Bureau of Internal Revenue on said protest.

It is, therefore, requested that petitioner be required to allege those facts in respect to the action taken by the Bureau of Internal Revenue upon said alleged protest of March 24, 1925, and that petitioner be required to attach to her petition an exact copy of the communication from the Bureau of Internal Revenue showing what action was taken by the Bureau of Internal Revenue on said protest, or in the alternative, that the exact contents of said communication from the Bureau of Internal Revenue taking action on said protest be recited in the petition.

In the event that this motion is overruled, defendant respectfully requests that an exception be allowed to it.

JOHN C. LEHR,
United States Attorney.
DAVID A. WOLFF,
Assistant United States Attorney.

In United States District Court

Order granting motion to strike

Entered October 19, 1936

11 Defendant's motion to strike Paragraph 3 (j) of the petition filed in the above entitled cause having come on to be heard and after hearing argument of counsel,

It Is Ordered that said motion to strike be, and the same is hereby granted.

ERNEST A. O'BRIEN,
United States District Judge.

In United States District Court

Order granting motion to make more definite and certain

Entered October 19, 1936

Defendant's motion for an order to make petition more definite and certain having come on to be heard, and after hearing argument of counsel,

It is ordered that the said motion be, and the same is hereby granted, and that petitioner have 15 days from the date hereof to comply with the terms of this order.

It is further ordered that the petitioner attach to the said petition a copy of the protest or claim for refund alleged by the petitioner to have been duly filed on March 24, 1925, and that petitioner attach a copy of the communication, if any, received by

her from the Commissioner of Internal Revenue, acting upon said protest or claim for refund.

ERNEST A. O'BRIEN,
United States District Judge.

12 In United States District Court

Amended petition

Filed November 2, 1936

To the Honorable, the Judges of the District Court of the United States for the Eastern District of Michigan, Southern Division:

Alice Gray Kales amends her petition in compliance with the Court's orders filed and entered in the above entitled cause on October 19, 1936, which orders granted defendant's motions to strike paragraph 3 (j) of her original petition and to make paragraphs 3 (g) and 3 (h) more definite and certain, to both of which orders petitioner respectfully takes exception, said original petition having been duly brought against The United States of America, pursuant to the provisions of Section 1122 of the Revenue Act of 1926, re-enacting the paragraph added by Section 1310 of the Revenue Act of 1921 at the end of paragraph Twentieth of Section 24 of the Judicial Code, relating to the jurisdiction of District Courts as amended, and without waiving said exceptions petitioner respectfully represents unto the Court and alleges that:

1. Petitioner is a citizen of the State of Michigan and resides in the City of Detroit within the Eastern District, Southern Division of said State.

2. The nature of petitioner's claim is for the recovery of One Hundred Ninety-five Thousand Seven Hundred Ten and 44 100ths Dollars ($195,710.44) in principal amount of income taxes illegally and erroneously assessed and collected from petitioner for the calendar year 1919, together with interest thereon.

3. The facts upon which said claim is based are as follows:

(a) On or prior to March 1, 1913, and continuously thereafter until July 7, 1919, petitioner owned 525 shares of the capital stock of Ford Motor Company. The March 1, 1913 value of said stock exceeded its cost or its fair market value at the time of acquisition by petitioner.

(b) On or about May 19, 1919, Daniel C. Roper, then Commissioner of Internal Revenue, determined the March 1, 1913 value of the stock of the Ford Motor Company to be Nine Thou-

sand Four Hundred Eighty-nine and 34/100 Dollars
13 ($9,489.34) per share. Thereafter petitioner, on, to wit, July 7, 1919, sold the aforesaid 525 shares of Ford Motor Company stock for the sum of Twelve Thousand Five Hundred Dollars ($12,500) per share.

(c) On, to wit, March 10, 1920, petitioner received a letter from John A. Grogan, Collector of Internal Revenue at Detroit, Michigan, granting her an extension of thirty (30) days from March 15, 1920, for filing her Personal Income Tax Return for 1919, a true copy of said letter being attached hereto, marked Exhibit "A", and made a part hereof. By virtue of said thirty-day extension, the due date for filing petitioner's 1919 Income Tax Return became and was April 14, 1920.

(d) On March 25, 1920, petitioner filed her 1919 Income Tax Return, showing an income tax due in the amount of One Million Two Hundred Sixteen Thousand Eighty-six and 26/100 Dollars ($1,216,086.26). Said tax was fully discharged in four installments paid to Collector John A. Grogan on March 25, 1920, June 14, 1920, September 13, 1920, and December 15, 1920.

(e) The fair market value on March 1, 1913 of said 525 shares of Ford Motor Company stock was, and is, Ten Thousand and no/100 Dollars ($10,000) per share and not Nine Thousand Four Hundred Eighty-nine and 34/100 Dollars ($9,489.34) per share as determined by Commissioner Roper, but acting under the duress of said Roper's determination petitioner computed the profit on the sale of the aforesaid Ford Motor Company stock on her 1919 Income Tax Return to be the difference between Twelve Thousand Five Hundred Dollars ($12,500) and Nine Thousand Four Hundred Eighty-nine and 34/100 Dollars ($9,489.34) per share. As a consequence of the under valuation of the March 1, 1913 value of said Ford Motor Company stock, petitioner over reported the profit on the sale of said stock by Two Hundred Sixty-eight Thousand Ninety-six and 50/100 Dollars ($268,096.50) and overpaid the income taxes legally due and owing by her for 1919 in the principal amount of One Hundred Ninety-five Thousand Seven Hundred Ten and 44/100 Dollars ($195,710.44), no part of which has been as yet refunded to her.

(f) Collector John A. Grogan went out of office on, to wit, November 27, 1921, and petitioner is informed and believes that
14 he died on, to wit, November 30, 1923, and that no probate was ever had of his estate. He was succeeded by Collector Fred L. Woodworth who went out of office on, to wit, August 15, 1933, and who is still out of office.

(g) On or about March 13 or 14, 1925, a jeopardy assessment was made against petitioner in the amount of Two Million Six Hundred Twenty-seven Thousand Three Hundred Nine and 05 100 Dollars ($2,627,309.05) for the year 1919, on the alleged ground that she had understated the profit on the sale of the said 525 shares of Ford Motor Company stock by Three Million Five Hundred Ninety-nine Thousand Fifty-three and 50 100 Dollars ($3,599,053.50). Thereafter, on March 24, 1925, petitioner paid said jeopardy assessment to Collector Fred L. Woodworth under written protest. On the same date, petitioner caused a duplicate of said written protest to be presented to the Commissioner of Internal Revenue.

In compliance with the terms of the Court order of October 19, 1936, to which petitioner respectfully takes an exception, Exhibit B is attached hereto, which exhibit petitioner is informed and believes, is a true copy of the aforesaid written protest. After payment of the aforesaid jeopardy assessment, petitioner received a letter dated April 6, 1925, from the Treasury Department, a copy of which is hereto attached and marked Exhibit C.

(h) At the time of filing and presenting said written protest, as aforesaid, petitioner included therein and filed with the Collector of Internal Revenue at Detroit, Michigan, and also with the Commissioner of Internal Revenue, a claim for refund of the excessive income taxes that had prior thereto been erroneously and illegally assessed and collected from her for the year 1919, on account of the sale of said 525 shares of Ford Motor Company stock, setting forth the grounds, among others, that the March 1, 1913 value of said stock was greatly in excess of Nine Thousand Four Hundred Eighty-nine and 34 100 Dollars ($9,489.34) per share and that petitioner had included in her 1919 Income Tax Return more taxable profit than was derived by her on said sale. Said claim for refund was duly filed on March 24, 1925, and within five years from the date petitioner's 1919 Income Tax Return was due.

(i) On, to wit, June 4, 1925, petitioner filed a separate claim for refund for the Two Million Six Hundred
15 Twenty-seven Thousand Three Hundred Nine and 05 100 Dollars ($2,627,309.05) paid under protest to Collector Woodworth on March 24, 1925, as aforesaid, and in the subsequent litigation against Collector Woodworth both the United States District Court for the Eastern District of Michigan and the United States Circuit Court of Appeals for the Sixth Circuit, held that the aforesaid jeopardy assessment of Two Million Six Hundred Twenty-seven Thousand Three Hundred Nine and 05 100 Dollars ($2,627,309.05) was illegal and void.

(j) (Paragraph j of the original petition was stricken by court order filed and entered October 19, 1936, to which order petitioner respectfully takes an exception.)

(k) On, to wit, September 24, 1928, and prior to any action being taken by the Commissioner of Internal Revenue on the refund claim filed March 24, 1925, petitioner filed an amendment to said refund claim in the manner and form prescribed by law, a copy of which amendment is hereto attached, marked Exhibit "D," and made a part hereof. Said amendment was based upon the same grounds stated in the original refund claim of March 24, 1925, and specified the March 1, 1913, value of the Ford Motor Company stock to be Ten Thousand Dollars ($10,000) per share, instead of Nine Thousand Four Hundred Eighty-nine and 34/100 Dollars ($9,489.34) as determined by Commissioner Roper and used on petitioner's 1919 Income Tax Return. The overpayment of petitioner's 1919 income taxes was computed to be One Hundred Ninety-five Thousand Seven Hundred Ten and 44/100 Dollars ($195,710.44), said sum being the normal tax of eight percent (8%) and the surtax of sixty-five percent (65%) on Two Hundred Sixty-eight Thousand Ninety-six and 50/100 Dollars ($268,096.50), said sum being the difference between the fair market price or value of the said 525 shares of Ford Motor Company stock on March 1, 1913, at Ten Thousand Dollars ($10,000) per share and the Roper valuation used by petitioner on her 1919 Income Tax Return, at Nine Thousand Four Hundred Eighty-nine and 34/100 Dollars ($9,489.34) per share.

(l) On, to wit, September 24, 1928, petitioner did also file a judgment claim, in the principal amount of Two Million
16 Six Hundred Twenty-seven Thousand Three Hundred Nine and 05/100 Dollars ($2,627,309.05), based upon the judgment theretofore taken against Collector Woodworth on account of the illegal jeopardy assessment collected by him on March 24, 1925, as aforesaid, and said judgment, together with certain interest, was paid on, to wit, November 13, 1928.

(m) Thereafter, on, to wit, June 13, 1929, a hearing was held on the amended refund claim of March 24, 1925, before the General Counsel for the Bureau of Internal Revenue, pursuant to the General Counsel's letter of June 5, 1929, a copy of which is hereto attached, marked Exhibit E and made a part hereof. Briefs were filed on behalf of petitioner and the matter of the disposition of said amended claim for refund was taken under advisement. From time to time, petitioner's counsel was advised by the General Counsel of the Bureau of Internal Revenue that attention would be given to said claim and that an effort would be made to reach a conclusion and dispose of the matter. Copies

of letters from the General Counsel dated February 7, 1933, July 31, 1933, and February 9, 1935, are hereto attached, marked Exhibits F, G, and H, and made a part hereof.

(n) More than six months have expired since the filing of the aforesaid claim for refund on March 24, 1925, and the amendment filed on, to wit, September 24, 1928, and the commencement of this suit, and no notice of the disallowance of said claim has been mailed to petitioner by registered mail by the Commissioner of Internal Revenue. Under date of June 4, 1935, petitioner did receive a letter from the Commissioner, by ordinary mail, a true copy of which is hereto attached, marked Exhibit I and made a part hereof. Under date of August 5, 1935, petitioner replied thereto, a true copy of said reply being hereto attached, marked Exhibit J and made a part hereof, and under dates of August 9, 1935, and August 20, 1935, petitioner received two letters from the Deputy Commissioner, true copies of which are hereto attached, marked Exhibits K and L and made a part hereof.

In Exhibit L it was erroneously assumed that the suit referred to in said Exhibit was based upon the refund claim filed March 24, 1925, and it was erroneously stated, among other things, that an attempt was made on September 21, 1928, to amend the claim for refund which gave rise to the litigation and judgment claim for refund, whereas the litigation in the Eastern
17 District of Michigan was brought against Collector Fred L. Woodworth based upon a claim for refund filed on, to wit, June 4, 1925. In said Exhibit L it was also erroneously stated that the refund claim filed in 1925 was merged into the judgment secured against the United States, whereas the judgment which petitioner obtained was not against the United States but was against Collector Woodworth. It was further erroneously stated in Exhibit L that the Bureau had not considered or treated the so-called amendment as a claim, whereas the Bureau, through its General Counsel and its officers and agents, had always treated said amendment and the refund claim of March 24, 1925, as claims from the time they were filed.

(o) No part of the aforesaid One Hundred Ninety-five Thousand Seven Hundred Ten and 44/100 Dollars ($195,710.44) of income taxes overpaid for the year 1919 has been refunded to the petitioner.

4. By virtue of the aforesaid, the United States became and now is indebted to the petitioner in the full amount of One Hundred Ninety-five Thousand Seven Hundred Ten and 44/100 Dollars ($195,710.44), with interest as provided by law.

5. No action other than as aforesaid has been had on said claim in Congress or by any of the Departments; no act, action,

suit or process is pending for or in respect to petitioner's claim in any other court against any person acting or professing to act mediately or immediately under the authority of the United States; no person other than petitioner is the owner thereof or interested therein; no assignment or transfer of this claim or of any part thereof or interest therein has been made; petitioner is justly entitled to the amount herein claimed from the United States after allowing all just credits and effects; the petitioner has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted or given encouragement to rebellion; petitioner is a citizen of the United States and believes the facts as stated in this petition to be true.

Wherefore, petitioner claims judgment against the defendant in the sum of One Hundred Ninety-five Thousand Seven Hundred Ten and 44 100 Dollars ($195,710.44), with interest thereon as provided by law.

ALICE G. KALES.

18 BEAUMONT, SMITH & HARRIS,
Attorneys for Plaintiff.

Business Address: 2900 Union Guardian Bldg., Detroit, Michigan.

[*Duly sworn to by Alice G. Kales; jurat omitted in printing.*]

Exhibit A

TREASURY DEPARTMENT.
INTERNAL REVENUE SERVICE.
Detroit, Michigan, March 10, 1920.

MRS. ALICE GRAY KALES,
Detroit, Mich.

For reasons stated in your letter, you are hereby granted an extension of 30 days from March 15, 1920 for filing your (Personal) Income Tax Return for 1919.

19 Your attention is invited to the following extract from Section 250 of the Revenue Act of 1918 as finally completed by Congress:

"Where an extension of time for filing a return is granted, the time for payment of the first installment shall be postponed until the date of the expiration of the period of the extension, but the time for payment of the other installments shall not be postponed unless the Commissioner so provides in granting the extension. In any case in which the time for payment of any installment is at the request of the taxpayer thus postponed, there

shall be added as part of such installment interest thereon at the rate of one-half of one per centum per month from the time it would have been due if no extension had been granted until paid."

This letter or a copy thereof must be attached to the return when filed.

Respectfully,

JOHN A. GROGAN, *Collector.*

Exhibit B

DETROIT, MICHIGAN, *March 23, 1925.*

To FRED L. WOODWORTH,

Collector of Internal Revenue, Detroit, Michigan.

DEAR SIR: I hereby protest against the assessment of deficiency tax levied against me as evidenced in notice dated March 14, 1925, on the ground that it is erroneous and illegal, and payment is hereby made under duress and solely to prevent the imposition of penalties threatened and the attachment of my property.

I protest against said assessment of said alleged deficiency and the payment of said tax for the following particular reasons, without however, waiving any other or further grounds or reasons for this protest.

1. The assessment of said alleged deficiency is illegal and contrary to the law.

2. The assessment of said alleged deficiency was made without giving the taxpayer notice of said deficiency or of a proposed assessment as provided in Section 274 of the Revenue Act of 1924 and without the taxpayer having the opportunity for sixty days after such notice to appeal from the determination of the Commissioner to the Board of Tax Appeals, likewise as provided in said Section 274, and the Assessment of said alleged deficiency is, therefore, illegal and void.

3. The Revenue Act of 1924 authorizes a deficiency assessment only when "the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay." There is in this case no such jeopardy, either according to the letter or to the spirit of the law. The impending expiration of the period of limitations is not such jeopardy. There is no ground whatever, legal or otherwise, for any belief by the Commissioner that the assessment or collection of the alleged deficiency would be jeopardized by delay, and the assessment is for that reason illegal and void.

4. The assessment of this alleged deficiency is based upon a reopening and reversal and setting aside of a previous assessment of the taxpayer's 1919 income tax and the final finding or decision as to the March 1, 1913, value of the stock of the Ford Motor Company made by a previous Commissioner of Internal Revenue, who was duly authorized to decide claims against the Government and to fix and assess the amount of taxes due from this taxpayer and to find and determine the essential facts in the computation of said tax. There is no authority given by the law to the present Commissioner to reopen and reverse or set aside the said findings and determinations of the previous Commissioner. And the assessment of the alleged deficiency is for this reason illegal and void.

21 5. The prior assessment against the taxpayer of her 1919 tax was computed on certain income which included income derived from the sale of certain shares of Ford Motor Company stock. This latter income was computed by deducting from the sale price of the stock a certain value thereof as of March 1, 1913. This value was fixed by the then Commissioner of the Internal Revenue Department and the Secretary of the Treasury without any consultation with or assistance in any way from this taxpayer, and a representation as to such value was made to this taxpayer by the Government prior to said sale of said stock as an inducement that this taxpayer sell said stock. The proposal of the Government was that if the taxpayer would sell her said stock, the Government would accept her payment of income taxes computed on the basis of its said determination of said value of said stock as of March 1, 1913. This proposal the taxpayer accepted and relying upon said agreement sold her stock and paid her tax in accordance with said agreement.

The transaction, therefore, is an executed agreement between the taxpayer, the Government and Mr. Henry Ford in which the Government received a valuable consideration. It cannot now be set aside and the alleged deficiency assessment is for that reason illegal and void.

6. The prior assessment against the taxpayer of her 1919 tax was computed on certain income which included income derived from the sale of certain shares of Ford Motor Company stock. This latter income was computed by deducting from the sale price of the stock a certain value thereof as of March 1, 1913. This value was fixed by the then Commissioner of Internal Revenue and approved by the Secretary of the Treasury without any consultation with or assistance in any way from this taxpayer and a representation of such value was made to this taxpayer by

the Government as an inducement that this taxpayer sell said stock. This representation was made prior to said sale, and it was this representation which did induce this taxpayer to dispose of her stock. The Government having made this representation and it having been so acted upon, the sale of the stock consummated and the tax paid, the assessment of said tax cannot now be reopened and set aside and the alleged deficiency assessment is for that reason illegal and void.

22 7. This taxpayer made no statement or representation to the Government as to the March 1, 1913, value of said Ford Motor stock. This taxpayer accepted the finding and determination of the Government as to said value in good faith and as a basis for an inducement of said sale and made the sale of the said stock to Mr. Henry Ford, relying on said finding of the Government. This taxpayer having thus acted in entire good faith cannot now be penalized, and having accepted the Government's finding and determination and having consummated the sale of the said stock in reliance thereon and having paid the tax so assessed as a result thereof, she cannot now be compelled to pay an additional alleged deficiency tax. And the assessment of the alleged deficiency is illegal and void.

8. Daniel C. Roper, Commissioner of Internal Revenue, without any request from this taxpayer and without any information obtained from this taxpayer or representation made by her, but solely from data obtained by him fixed a certain value of the Ford Motor Company stock as of March 1, 1913. Thereafter in writing he advised this taxpayer of that value and that if this taxpayer should sell her said stock in said Ford Motor Company, her taxable profit would be the difference between the value so fixed and the sale price. In reliance on said representation this taxpayer sold her stock and made her return in accordance with such representation. The Government of the United States accepted the return, and assessed the tax upon the value so fixed and notified this taxpayer quarter-annually of the amount of the tax so computed on said basis. This taxpayer thereafter paid the tax as thus determined by the Government, and the payments were accepted by the Government in full settlement of said assessment. The taxpayer cannot now recover back her stock. The Government in making the deficiency assessment affirms that not only was the tax which was paid properly paid and that it will be retained by the Government, but also that an additional and deficiency tax must be paid. The taxpayer, therefore, if the position of the Government is correct, cannot be put in statu quo. The Government, therefore, having induced by its official acts and representations that said taxpayer sell the stock and pay said tax, is estopped from reopening, reversing

or setting aside the determination of value as of March
23 1, 1913, made by Daniel C. Roper, Commissioner of In-
ternal Revenue, and the assessment of the tax upon that basis and is estopped from assessing as against this taxpayer a deficiency based upon a new and different valuation of said Ford Motor Company stock as of March 1, 1913.

9. This taxpayer further advises you and the Commissioner of Internal Revenue and the United States Government, that, while it is her position that the deficiency assessment is so illegal and void, as is set forth in paragraphs 1 to 8 above, and is likewise illegal and void and contrary to law for other reasons, that if it should be held either by the Internal Revenue Department, on the hearing of a claim for refund or otherwise, or by the Board of Appeals, or by any other Board or body having jurisdiction thereof to which this controversy should be submitted, or by any court of competent jurisdiction thereof, that the former assessment as made by Commissioner Daniel C. Roper should be set aside and vacated, and that the March 1, 1913, value of the said Ford Motor Company stock as fixed by Daniel C. Roper, Commissioner of Internal Revenue, and his finding and determination as to same shall be vacated, set aside, reopened or reversed, and the contentions of this taxpayer as heretofore set forth be overruled then this taxpayer will show and claim and insist that the valuation of $9.489.34 on each share of Ford Motor Company stock fixed by the said Daniel C. Roper, Commissioner of Internal Revenue, is substantially less than the fair value of said stock on the basic date, and that the said stock was greatly undervalued by the Commissioner and that the fair value of said stock per share as of March 1st, 1913 was greatly in excess of $9,489.34, and that therefore this taxpayer should recover from the Collector of Internal Revenue, to whom said tax on said transaction was paid, or from the Government of the United States, such portion of the tax heretofore paid on said transaction as may be found to have been excessive when the fair value of said stock as of March 1, 1913, shall have been determined and the tax on the basis thereof shall have been recomputed.

10. Protestant, while insisting for the reasons among others above stated, that the valuation of said stock as of March 1,
1913, made by the Department as aforesaid and approved
24 by the Secretary of the Treasury should stand, yet if for any reason a revaluation shall be had protestant will insist that said stock as valued by the Department as aforesaid, was grossly undervalued and that she was required to and did pay an excessive tax upon an alleged excessive profit arising

from said sale, and she will claim the right to a refund of said tax to the extent of such excess. Considering the laches of the Department and the fraud (actual or constructive) perpetrated upon protestant, she will also claim that the running of the statute of limitations against her right to said refund is postponed until a reasonable time after any such revaluation.

You are likewise advised that this taxpayer will make claim for the refund of the deficiency tax herewith paid and should such refund be denied she will bring legal proceedings to recover same and for such other and further relief to which she may be entitled.

Yours very truly,

ALICE G. KALES.

25 *Exhibit C*

Office of Commissioner of Internal Revenue. Address Reply to Commissioner of Internal Revenue And Refer to IT:R:P: EAB.

TREASURY DEPARTMENT,
Washington, April 6, 1925.

MRS. ALICE H. KALES,
c/o Beaumont, Smith & Harris, 1122 Ford Building, Detroit, Michigan.

MADAM: This office is in receipt of your protest against the assessment of deficiency in tax as levied against you for the year 1919 in the amount of $2,627,309.05.

In reply, you are advised that in view of the fact that the Statutory period within which the Commissioner might assess additional taxes for the year 1919 was about to expire, it was necessary in order to protect the interest of the Government to make an immediate assessment under the provisions of Section 274 (d) of the Revenue Act of 1924. Under the provisions of Section 279 (a) of the Revenue Act of 1924 a claim for abatement may be filed within ten days after the issuance of the demand notice by the Collector.

When the claim has been received in this office, it will be assembled with the case and given prompt consideration.

Inasmuch as the records of this office fail to disclose he receipt of power of attorney authorizing Beaumont, Smith and Harris to represent you in matters pertaining to your income tax liability, the information is furnished you direct.

Respectfully,

G. J. BRIGHT,
Deputy Commissioner.

26 *Exhibit D*

(Execute Separate Form for Each Tax Period)

AMENDMENT TO CLAIM FOR

x Refund of Taxes Illegally Collected.

STATE OF MASSACHUSETTS,
County of Barnstable, ss.

ALICE G. KALES,
1730 Burns Ave., Detroit, Michigan.
1124 Ford Building, Detroit, Michigan.

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

1. Business in which engaged.....
2. Character of assessment or tax—Income on sale of Ford Motor Co. stock—Period: January 1, 1919 to January 1, 1920.
   (State for or upon what the tax was assessed or the stamps affixed.)
3. Amount of assessment or stamps purchased..... $.....
4. Reduction of Tax liability requested (Income and Profits Tax)..... $.....
5. Amount to be abated..... $.....
6. Amount to be refunded (or such greater amount as is legally refundable)—$195,710.44 and interest at 6% per annum on each quarterly payment made as follows: March 25, June 14, Sept. 13 and Dec. 15, 1920.
8. District in which return (if any) was filed—First District of Michigan.
9. District in which unpaid assessment appears.....

27 10. Amount of overpayment claimed as credit..... $.....

11. Unpaid assessment against which credit is asked; period from..... to ..... $.....

Deponent verily believes that this application should be allowed for the following reasons:

See attached sheets containing reasons.

(Attach additional sheets if necessary.)

ALICE G. KALES.

Sworn to and subscribed before me this 11th day of September 1928. IDA M. TAYLOR, *Notary Public.*

My Commission Expires May 4, 1934.

STATE OF.....,
County of..... ss.

AMENDMENT TO CLAIM FOR REFUND

Filed March 24, 1925.

On or prior to March 1st, 1913, and continuously thereafter until July 7th, 1919, deponent owned 525 shares of capital stock of Ford Motor Company. On or about July 7th, 1919, she sold this stock for Twelve Thousand Five Hundred ($12,500.00) Dollars per share. On or about May 19, 1919, Daniel C. Roper, then Commissioner of Internal Revenue, determined a value of the stock of the Ford Motor Company as of March 1, 1913, at Nine Thousand Four Hundred Eighty-nine and 34/00 ($9,489.34) Dollars and indicated that this value should be used in computing any profits made on the sale thereof. Deponent believed that this Roper valuation was less than the fair market price or value of said stock on March 1st, 1913, but in compliance with said Roper valuation and under the duress thereof, deponent included in her income tax return for the year 1919, as taxable income, the difference between the sale price of $12,500.00 per share and the Roper valuation of $9,489.34 per share. Deponent obtained a thirty-day extension for filing her 1919 income tax return, thus fixing the time in which said return was due at April 14, 1920. She filed said return on March
28 26, 1920, and she paid the tax under the duress of said Roper determination on the difference between $12,500.00 per share and $9,489.34 per share, in four installments in March, June, September, and December of 1920.

On or about March 13th or 14th, 1925, a jeopardy assessment amounting to Two Million Six Hundred Twenty-seven Thousand Three Hundred Nine and 05/100 ($2,627,309.05) Dollars was levied against her by the then Commissioner of Internal Revenue on the alleged ground that she had underpaid her income tax for the year 1919 on the sale of said stock. Thereupon, a ten-day notice and demand was served upon her. On to wit, the 24th day of March 1925, she paid said jeopardy assessment under protest. At the time of the filing of said protest she included therein and filed with the Collector of Internal Revenue at Detroit, Michigan, and presented to the Commissioner of Internal Revenue a claim for refund of income taxes erroneously and illegally assessed and collected against her in 1920 on ac-

count of the sale of said 525 shares of Ford Motor Company stock and on account of her having included in said return more profit than was derived from the sale of said Ford stock and by reason of the inclusion of the Roper valuation as a basis under the duress thereof. Said claim for refund was filed on March 24, 1925, and within five years from the date said return was due and is as follows:

"Protestant while insisting for the reasons among others above stated that the valuation of said stock as of March 1, 1913, made by the Department as aforesaid and approved by the Secretary of the Treasury should stand, yet if for any reason a revaluation shall be had Protestant will insist that said stock as valued by the Department as aforesaid, was grossly undervalued and that she was required to and did pay an excessive tax upon an alleged excessive profit arising from said sale, and she will claim the right to a refund of said tax to the extent of such excess. Considering the laches of the Department and the fraud (actual or constructive) perpetrated upon Protestant she will also claim that the running of the Statute of Limitations against her right to said refund is postponed until a reasonable time after any such revaluation."

29 Both the United States District Court at Detroit and the United States Circuit Court of Appeals for the Sixth Circuit have held that said jeopardy assessment of March 14, 1925, was illegal and void. The United States Board of Tax Appeals has fixed and determined a fair market price or value of the stock of the Ford Motor Company as of March 1st, 1913, at Ten Thousand ($10,000.00) Dollars per share and has determined that $10,000.00 per share was the basis for determining profit on the sale thereof. No action has been taken by the Commissioner of Internal Revenue on deponent's claim for refund filed on March 24, 1925. Deponent avers that the fair market price or value of said stock on March 1, 1913, was and is $10,000.00 per share.

Deponent hereby amends said claim for refund and alleges the foregoing facts are amendatory and supplemental thereto and avers that there was erroneously and illegally assessed against her and collected from her in 1920, under the duress of the Roper determination, alleged income taxes amounting to One Hundred Ninety-five Thousand Seven Hundred Ten and 44/100 ($195,710.44) Dollars, being the normal tax of 8% and the surtax of 65% on the difference between the fair market price or value of said stock on March 1, 1913, which was and is $10,000.00 per share, and was fixed by the Board of Tax Appeals at $10,000.00 per share, and the Roper determination of $9,489.34 per share.

Deponent avers that for the reasons aforesaid, said $195,710.44, together with interest thereon at 6% per annum from the several dates of payment in 1920, should be refunded to her.

Deponent reserves the right to allege any other or further reasons by amendment or otherwise.

(Signed) ALICE G. KALES.

Sworn to and subscribed by me this 11th day of September A.D. 1928.

(Signed) IDA M. TAYLOR,
Notary Public, Barnstable County.

My Commission expires May 4, 1934.

30 *Exhibit E*

Office of The General Counsel. Address Reply to the General Counsel Bureau of Internal Revenue And Refer to GC:A 233850.

TREASURY DEPARTMENT,
BUREAU OF INTERNAL REVENUE,
Washington, June 5, 1929.

MR. HAL H. SMITH,
Union Trust Building, Detroit, Michigan.

SIR: Pursuant to your request, you will be given an opportunity to present oral argument on the pending refund claim filed by Alice G. Kales, which claim is predicated upon the finding of the Board of Tax Appeals of the March 1, 1913, value of the stock of the Ford Motor Company. A hearing will be accorded you on the 13th of the current month, at 10:30 a.m., unless you find it inconvenient to be present at that time, in which event, kindly advise me promptly, suggesting another date more convenient to you.

Respectfully,

(Signed) C. M. CHAREST,
General Counsel.

31 *Exhibit F*

TREASURY DEPARTMENT,
BUREAU OF INTERNAL REVENUE,
Washington, February 7, 1933.

Office of The General Counsel. Address Reply to the General Counsel Bureau of Internal Revenue and refer to GC:WHT A-233850.

MR. A. BROOMFIELD,
% Messrs. Beaumont, Smith & Harris,
Union Guardian Building, Detroit Michigan.

SIR: Pursuant to your oral request of a few days since, there is enclosed herewith an office copy of amendment to the refund

claim of Alice G. Kales, the jurat date of the amendment being September 11, 1928.

At the time of your recent call you were advised that early attention would be given to Mrs. Kales' claim, as requested in letter of your partner, Mr. Smith, dated January 17th last.

Respectfully,

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Enc. 69564.
sdr.

22 *Exhibit G*

TREASURY DEPARTMENT.
BUREAU OF INTERNAL REVENUE.
Washington, July 31, 1933.

Office of The General Counsel. Address Reply to the General Counsel Bureau of Internal Revenue and refer to GC:I:WHT A-233850.

BEAUMONT, SMITH & HARRIS,
Counselors at Law,
Union Guardian Building, Detroit, Michigan.

(Attention: Mr. Hal H. Smith.)

SIRS: Receipt is acknowledged of your letter of July 13th relating to the claim of Alice G. Kales. It is hoped that a conclusion may be reached in the matter at an early date.

Respectfully,

(Signed) E. BARRETT PRETTYMAN,
General Counsel,
Bureau of Internal Revenue.

33 *Exhibit H*

Office of Assistant General Counsel. Address Reply to Assistant General Counsel For Bureau of Internal Revenue And Refer to GC:I:WHT A-233850.

TREASURY DEPARTMENT.
BUREAU OF INTERNAL REVENUE.
Washington, February 9, 1935.

Messrs. BEAUMONT, SMITH & HARRIS,
Union Guardian Building, Detroit, Michigan.

(Attention Mr. Hal H. Smith.)

SIRS: Receipt is acknowledged of your letter of January 23rd, inquiring as to the present status of the refund claim of Alice

G. Kales. You are advised that every effort will be made to reach a conclusion and dispose of the matter within a few weeks.

Respectfully,

(Signed) ROBERT H. JACKSON,
Assistant General Counsel for the
Bureau of Internal Revenue.

sdr.

34 *Exhibit I*

Office of Commissioner of Internal Revenue. Address Reply to Commissioner of Internal Revenue And Refer to

TREASURY DEPARTMENT,
Washington, June 4, 1935.

MRS. ALICE G. KALES,
c/o Hal H. Smith,
1122 Ford Building, Detroit, Michigan.

MADAM: Under date of September 21, 1928, you filed a Form 843, apparently intended by you to constitute a claim for refund of $195,710.44 income taxes for the year 1919.

The records of the District Court of the United States, Eastern District of Michigan, Southern Division, disclose that under date of June 12, 1928, judgment was entered in your favor by that court in the principal amount of $2,627,309.05, together with interest and costs, representing an overpayment of your tax for the year 1919. A check in settlement of this judgment was issued under date of November 10, 1928.

In view of the foregoing, the Bureau is precluded from giving further consideration in any respect to the matter of your income tax liability for the taxable year 1919.

Respectfully,

(Signed) GUY T. HELVERING,
Commissioner.

WM EKP.

35 *Exhibit J*

HARWICH PORT, MASS., *August 5th, 1935.*

Honorable GUY T. HELVERING,
Commissioner of Internal Revenue, Washington, D. C.

DEAR SIR: This will acknowledge receipt of your letter of June 4, 1935, to me in the matter of my Claim for Refund of $195,710.44 income taxes for the year 1919. I construe your letter to be a disallowance of my Claim for Refund and I would kindly ask you if I am correct in this assumption.

Very truly yours,

(Signed) ALICE G. KALES.

Copy of letter sent to Com. Internal Revenue.

36 *Exhibit K*

Office of Commissioner of Internal Revenue. Address Reply to Commissioner of Internal Revenue And Refer to IT:C:CC:3-HHG.

TREASURY DEPARTMENT,
Washington, August 9, 1935.

Mrs. ALICE G. KALES,
Harwich Port, Massachusetts.

In re Year 1919

MADAM: Receipt is acknowledged of your letter dated August 5, 1935, relative to your claim for refund of income tax.

Careful consideration will be given to your communication and you will be advised at the earliest practicable date, of the action taken.

Respectfully,

CHAS. T. RUSSELL,
Deputy Commissioner.
By (Signed) S. A. MITCHELL,
Chief of Section.

37 *Exhibit L.*

Office of Commission of Internal Revenue. Address Reply to Commissioner of Internal Revenue And Refer to IT:E:RRR.

TREASURY DEPARTMENT,
Washington, August 20, 1935.

Mrs. ALICE G. KALES,
Harwich Port, Massachusetts.

MADAM: Further reference is made to your letter dated August 5, 1935, relative to the refund of $195,710.44, income taxes paid for the year 1919.

The records of the Bureau indicate that you filed a judgment claim dated September 21, 1928, in the principal sum of $2,627,309.05, based upon the decision of the District Court of the United States for the Eastern District of Michigan, affirmed by the United States Circuit Court of Appeals for the Sixth Circuit on May 10, 1928. There was also filed by you on September 21, 1928, a form purporting to be an amendment to a claim for refund filed March 24, 1925, presenting the contention that a further refund should be allowed in the amount of $195,710.44. Thus, after filing suit based upon the claim filed in 1925 and obtaining judgment for the full amount claimed, an attempt was made on September 21, 1928 to amend the claim for refund which

gave rise to the litigation and judgment claim for refund, for the purpose of securing an additional refund of taxes for the same year.

The refund claim filed in 1925 was merged into the judgment secured by you against the United States and you were, therefore, precluded from filing an amendment to the earlier claim which had been finally adjudicated.

38 The Bureau has not considered or treated the so-called amendment as a claim and consequently there was no necessity for a disallowance as suggested by you. The adjudication by the court removed this matter from the realm of administrative action other than to make refund as directed by the judgment.

Respectfully,

(Signed) CHAS. T. RUSSELL,
Deputy Commissioner.

In United States District Court

Motion to dismiss

Filed December 4, 1936

Comes now the defendant, The United States of America, by John C. Lehr, United States Attorney, and respectfully moves the Court to dismiss this alleged cause of action for the following reasons, to wit:

A. This Court has no jurisdiction of this action, since the plaintiff's suit is barred by the Statute of Limitations and by the provisions of Section 3226 of the Revised Statutes of the United States, because—

(1) No claim for refund was filed within the period of the Statute of Limitations. The document attached to the plaintiff's amended petition, marked Exhibit B, which is a protest of the plaintiff dated March 23, 1925, neither constitutes nor includes a claim for refund.

(2) The claim for refund filed by the plaintiff with the Commissioner of Internal Revenue on September 21, 1928, was filed after the Statute of Limitations had expired and can not serve as a basis for this suit.

39 (3) In the alternative, even if the protest of March 23, 1925, attached to the plaintiff's amended petition, marked Exhibit B, were to be considered a claim for refund, the denial of said protest by the Commissioner of Internal Revenue, shown by the Commissioner's letter of April 6, 1925, attached to the plaintiff's amended petition, marked Exhibit C, constituted a re-

jection of said alleged claim for refund. Neither suit nor an amended claim was filed thereafter within the period of the Statute of Limitations.

(B) In the alternative, this alleged cause of action should be dismissed by this Court even if the protest of March 23, 1925, attached to the plaintiff's amended petition, marked Exhibit B, were to be considered as constituting a claim for refund, since said claim became extinguished by virtue of its merger with the judgment rendered in favor of the plaintiff in this Court under date of June 12, 1928, against Fred L. Woodworth, Collector of Internal Revenue, which judgment was affirmed by the United States Circuit Court of Appeals for the Sixth Circuit. (26 F. (2d) 178.) Plaintiff filed a claim for the payment of said judgment under date of September 21, 1928, and a Treasury check in full settlement and payment of this judgment was issued to the plaintiff under date of November 10, 1928.

Wherefore, defendant moves the Court to dismiss this alleged cause of action.

JOHN C. LEHR,
United States Attorney.
TRENT MCMATH,
Assistant United States Attorney.

40 In United States District Court

Affidavit in opposition to motion to dismiss

Filed January 14, 1937

STATE OF MICHIGAN,
County of Wayne, ss.

Archibald Broomfield, being first duly sworn, deposes and says that he is a member of the law firm of Beaumont, Smith & Harris and is familiar with the various income tax matters of Alice Gray Kales, particularly with regard to the year 1919.

On March 24, 1925 deponent wrote to the Commissioner of Internal Revenue on the stationery of Beaumont, Smith & Harris, the following being a copy of the original of said letter together with the endorsements placed thereon by the Bureau of Internal Revenue:

"RP—John W. Beaumont, Hal H. Smith, Julian H. Harris, Charles Wright, Jr., Archibald Broomfield, Albert E. Meder, Thomas B. Moore.

Percy J. Donovan, Melville C. Mason, Roy H. Curtiss, Marion S. Harlan, Charles H. McIntyre, U. George Krapfel, Yates G. Smith, Joseph A. Vance, Jr.

BEAUMONT, SMITH & HARRIS,
COUNSELORS AT LAW, 1122 FORD BUILDING.
Detroit, Mich., March 24, 1925.

HON. DAVID H. BLAIR,
Commissioner of Internal Revenue, Washington, D. C.

DEAR SIR: As attorneys for Alice G. Kales, of this city, we are herewith filing with you the protest of Alice G. Kales dated
41 March 23, 1925, a duplicate of which was this day delivered to Fred L. Woodworth, Collector of Internal Revenue at Detroit. Will you kindly acknowledge receipt of same? Your very truly,

BEAUMONT, SMITH & HARRIS,
By A. BROOMFIELD.

AB S.
Enc.
Called 235—3-31-25 308069.
Ch'd to Sol. 7-18-24 Mar. 1925 Spec. 5 Page 0 Line 4.
No record of Power.

$2,627,309.05 h 1 "

Exhibit B attached to plaintiff's amended petition is a copy of the protest referred to in deponent's letter of March 24, 1925.

Thereafter, under date of April 6, 1925, G. J. Bright, Deputy Commissioner, in response to the request in deponent's letter of March 24, 1925, that he kindly acknowledge receipt of the protest, did so acknowledge receipt, a true copy of said letter being attached to plaintiff's amended petition and marked Exhibit C.

Exhibit B attached to plaintiff's amended petition, being the aforesaid protest in which was contained a claim for refund, was retained by the Commissioner without any objection as to the sufficiency of that part of the protest giving notice of the overpayment of Mrs. Kales' 1919 income taxes, and at no time prior to the filing of defendant's motion to dismiss was a claim ever made that Exhibit C attached to plaintiff's amended petition, being the Deputy Commissioner of Internal Revenue's letter of April 6, 1925, constituted a rejection of the refund claim contained in the aforesaid Exhibit B.

Before any action was taken by the Commissioner of Internal Revenue on the claim for refund contained in the aforesaid Exhibit B, the plaintiff in the above-entitled cause caused to be filed with the Commissioner of Internal Revenue and the Collector of Internal Revenue, a formal amendment to the claim for refund filed March 24, 1925, in the amount of $195,-

710.44, a true copy of which is attached to plaintiff's amended petition marked Exhibit D.

42 *Affidavit in Opposition to Motion to Dismiss*

On, to wit, June 13, 1929, deponent and Mr. Hal H. Smith, attorneys for the plaintiff, attended a hearing at Washington, D. C., before the Honorable C. M. Charest, General Counsel for the Bureau of Internal Revenue, in response to the hearing fixed by the said General Counsel in his letter of June 5, 1929, a copy of which is attached to plaintiff's amended petition and marked Exhibit E. Present also at said hearing and representing the Commissioner of Internal Revenue, was Mr. W. Hall Trigg, Special Assistant. A full hearing on the merits of Mrs. Kales' claim for refund was held at this meeting A voluminous brief was filed on her behalf supporting her contentions that the protest, Exhibit B, was a sufficient informal claim for refund, that it was filed within the statutory period and was sufficient to support the subsequent amendment filed on, to wit, September 24, 1928, and that the suit and judgment against Collector Fred L. Woodworth for the amount of the jeopardy assessment in the principal amount of $2,627,309.05 did not bar the claim for the refund of the $195,710.44 excess income taxes paid during the year 1920.

During deponent's argument on the question of the sufficiency of the protest Exhibit B, the General Counsel stopped deponent and stated that they were satisfied that said protest was sufficient to constitute an informal claim for refund and that it was filed within the statutory period.

Thereafter, under date of June 21, 1929, deponent prepared and forwarded to the General Counsel of the Bureau of Internal Revenue, a supplemental brief wherein it was stated:

"We understand that it is admitted that our informal claim for refund, filed March 24, 1925, was filed within the period limited by the statute and was sufficient as an informal claim for refund; that the amendment to this informal claim for refund filed on September 11, 1928, sufficiently complies with the requirements of the statute and the regulations so that it is now admitted that the taxpayer's claim for refund is proper both as to time of filing and formal requirements. The sole question is as to whether or not the proceedings in the District Court were of such a nature that this claim for refund cannot now be allowed

43 * * *." Said supplemental brief was retained by the Bureau of Internal Revenue and no exceptions ever taken to the aforesaid statements. Thereafter, on June 24, 1929, the

General Counsel for the Bureau of Internal Revenue acknowledged receipt of said supplemental brief and stated that it would receive careful consideration.

On, to wit, January 27, 1933, deponent again had a conference with a member of the staff of the General Counsel of the Bureau of Internal Revenue, who again reiterated that they were satisfied that the informal claim was filed in time and that it was good as an informal claim, and deponent was informed that the delay in acting was due to the fact that the Bureau were considering certain claims of Mrs. Kales' brothers.

After said conference, deponent received the letter of February 7, 1933, from C. M. Charest, General Counsel of the Bureau of Internal Revenue, being Exhibit F attached to plaintiff's amended petition.

On June 18, 1935, deponent again conferred with a member of the staff of the General Counsel for the Bureau of Internal Revenue with regard to the contents of the Commissioner's letter of June 4, 1935, being Exhibit I attached to plaintiff's amended petition, and said representative expressed surprise at its form and contents and stated that he had previously recommended to the former General Counsel Charest that plaintiff's claim for refund be allowed.

Deponent further says that upon a trial of the above entitled cause the plaintiff is in a position to prove in court all of the facts found by the United States Board of Tax Appeals in the case of James Couzens, 11 B. T. A. 1040, and in particular the matters set forth in the footnote to the opinion of the United States Circuit Court of Appeals, Sixth Circuit, in the case of Woodworth, collector, v. Kales, 26 F. (2d) 178, particularly with regard to the information possessed by the Commissioner of Internal Revenue in 1919 regarding the March 1, 1913, value of the Ford Motor Car Company's stock, which information the Commissioner received from examinations made of the books and records of the Ford Motor Car Company.

Deponent further says that on or about the time that the aforesaid jeopardy assessment of $2,627,309.05 was made against
44 plaintiff in the above entitled cause, that it is a matter of record that the Commissioner of Internal Revenue was still investigating the March 1, 1913 value of the said Ford Motor Car Company stock, and that the aforesaid jeopardy assessment was made before the investigation was completed by reason of the fact that the statutory period within which the Commissioner might have assessed additional taxes for 1919 was about to expire.

Deponent further says that after further investigation the Commissioner of Internal Revenue on or about November 3, 1925, re-

determined the March 1, 1913, value of the Ford Motor Car Company stock to be $3,547.84 per share instead of $2,634.00 per share, the amount used in computing the aforesaid jeopardy assessment, and deponent is informed and believes that the matter of the March 1, 1913 value of the Ford Motor Car Company stock was under consideration by the Commissioner of Internal Revenue up to and including the commencement of the hearing before the United States Board of Tax Appeals in the case of James Couzens, 11 B. T. A. 1040, which hearing commenced on January 11, 1927.

As a result of said hearing, the Board of Tax Appeals determined on, to wit, May 5, 1928, that the March 1, 1913 value of the said Ford Motor Car Company stock was $10,000 per share, and that no appeal was taken from said decision.

Deponent is further informed and believes that as a result of the March 1, 1913 value of $10,000 per share so determined by the Board, that refunds were made to other stockholders of the Ford Motor Car Company, to wit: James Couzens, Rosetta V. Hauss, John F. Dodge Estate, Anna T. Dodge, et al., Executors, Horace H. Rackham and John W. Anderson.

Deponent further says and charges the fact to be that the Commissioner of Internal Revenue well knew that if the March 1, 1913 value of the Ford Motor Car Company stock was in excess of $9,489.34, as determined by Commissioner Roper and used by plaintiff on her 1919 income tax return, that plaintiff did thereby overpay the amount of income taxes legally due for that year, that the Commissioner of Internal Revenue had in his files in March 1925, more information regarding the March 1, 1913, value of the Ford Motor Car Company stock than plaintiff possessed, and the Commissioner having also the claims
45 of the various other stockholders of the Ford Motor Car Company involving the March 1, 1913, value of the Ford Motor Car Company stock was not misled or prevented from making further investigations of said March 1, 1913, value by reason of the plaintiff not fixing in dollars and cents the March 1, 1913 value of the Ford Motor Car Company stock in the protest filed March 24, 1925, being Exhibit E attached to plaintiff's amended petition.

Further deponent said not.

ARCHIBALD BROOMFIELD.

Subscribed and sworn to before me this 12th day of January 1937.

FRANK E. COOPER,
Notary Public, Wayne County, Michigan.

My commission expires August 16, 1938.

In United States District Court

Opinion

Filed February 18, 1939

This matter came on for hearing on defendant's motion to dismiss plaintiff's cause of action on the ground that (1) no claim was filed within the period of limitations (the document attached to plaintiff's amended petition being a mere protest and not a claim for refund); (2) that even if such document be considered a claim for refund, that the Commissioner's letter of April 6, 1925 constituted a denial and hence plaintiff's proposed amended claim for refund filed in September 1928, was not timely; and (3) that the alleged cause of action became extinguished by virtue of the judgment rendered in favor of
46 plaintiff in this Court on June 12, 1928, which was affirmed by the Circuit Court of Appeals for the Sixth Circuit (26 Fed. (2) 178).

In regard to defendant's first ground, the controlling issue is whether the protest (Exhibit B attached to amended declaration) filed March 24, 1925, was an informal or defective claim for refund that could be perfected by amendment filed September 24, 1928.

It is plaintiff's claim that said protest was an informal claim for refund upon which the Commissioner had not taken any action thereon prior to September 24, 1928, and hence by virtue of the amendment to the claim which was filed prior to action by the Commissioner, the claim became timely perfected. The plaintiff cites as principal authorities in support of her contention United States v. Memphis Cotton Oil Co., 288 U. S. 62, and United States v. Factors & Finance Co., 288 U. S. 89. In each of the above cited cases the objection was made that the earlier claim was defective for failure to state the grounds for which the refund was demanded and the Court held that the general claim for refund in specifying grounds was subject to amendment until finally rejected, irrespective of limitations running in the interim. In both cases there was clearly a definite and present claim for refund.

The important facts in the case at bar set forth in the pleadings are as follows. In 1919 plaintiff and other stockholders of Ford Motor Company, contemplating the sale of their stock for $12,500.00 a share and wishing to know the basis for such stock so that they could compute tax liability before sale, applied to the Commissioner of Internal Revenue, who, in May of 1919, determined that the fair market value of said stock as of March 1, 1913 was $9,189.34 per share. Plaintiff completed the sale in

1919 of 525 shares of said stock at $12,500.00 per share and filed her income tax return showing a profit on said stock of approximately $3,000.00 per share, using the March 1, 1913 value as previously fixed by the Commissioner as the basis, and paid a tax of $1,216,086.26. On or about March 13, 1925 a jeopardy assessment was made by the then Commissioner of Internal Revenue against plaintiff in the sum of $2,627,309.05 for the year 1919, on the grounds that she had understated the profit on the sale of the Ford Motor Company stock, claiming that the March 1, 1913 value was much less than the $9,489.34 reported by plaintiff and previously agreed to by the former Commissioner of Internal Revenue. On March 24, 1925 plaintiff paid said jeopardy assessment to Fred L. Woodworth as Collector of Internal Revenue under written protest filed with him, and caused a duplicate of such protest to be presented to the Commissioner of Internal Revenue. It is this written protest that plaintiff claims constitutes an informal claim for refund.

Thereafter on June 4, 1925 petitioner filed a claim for refund for the $2,627,309.05 as paid under protest as aforesaid, and in subsequent litigation brought in this Court it was held that said jeopardy assessment was illegal and void. This decision was affirmed by the Circuit Court of Appeals for this Circuit in Woodworth v. Kales, 26 Fed. (2) 178, and said $2,627,309.05 with interest was paid by the United States to plaintiff on November 13, 1928.

In litigation before the Board of Tax Appeals, brought by other Ford Motor stockholders, in which plaintiff was not involved, the March 1, 1913 value of the Ford Motor Company stock was determined to be $10,000.00 James Couzens v. Commissioner, 11 B. T. A. 1040.

The plaintiff's claim for refund in suit at bar is based upon her alleged error in reporting the basis of said stock to be $9,489.34 per share as originally determined by the Commissioner, rather than $10,000.00 per share as determined by the Board of Tax Appeals.

As I have said, the question is whether or not plaintiff's protest could be considered an informal claim for refund. The pertinent parts of said protest, in the form of a letter to the Collector, read as follows:

DETROIT, MICHIGAN, *March 23, 1925.*

To FRED L. WOODWORTH,
Collector of Internal Revenue, Detroit, Michigan.

DEAR SIR: I hereby protest against the assessment of deficiency tax levied against me as evidenced in notice dated March

48 14, 1925, on the ground that it is erroneous and illegal, and payment is hereby made under duress and solely to prevent the imposition of penalties threatened and the attachment of my property.

I protest against said assessment of said alleged deficiency and the payment of said tax for the following particular reasons, without however, waiving any other or further grounds or reasons for this protest.

1. The assessment of said alleged deficiency is illegal and contrary to the law.

(Here follow numerous grounds upon which said protest is based).

9. This taxpayer further advises you and the Commissioner of Internal Revenue and the United States Government, that while it is her position that the deficiency assessment is so illegal and void, as is set forth in paragraphs 1 to 8 above, and is likewise illegal and void and contrary to law for other reasons, that *if* it should be held either by the Internal Revenue Department, on the hearing of a claim for refund or otherwise, or by the Board of Appeals, or by any other Board or body having jurisdiction thereof to which this controversy should be submitted, or by any court of competent jurisdiction thereof, that the former assessment as made by Commissioner Daniel C. Roper should be set aside and vacated, and that the March 1, 1913, value of the said Ford Motor Company stock as fixed by Daniel C. Roper, Commissioner of Internal Revenue, and his finding and determination as to same shall be vacated, set aside, reopened or reversed, and the contentions of this taxpayer as heretofore set forth be overruled then this taxpayer will show and claim and insist that the valuation of $9,489.34 on each share of Ford Motor Company stock fixed by the said Daniel C. Roper, Commissioner of Internal Revenue, is substantially less than the fair value of said stock on the basic date, and that the said stock was greatly undervalued by the Commissioner and that the fair value of said stock per share as of March 1st, 1913 was greatly in excess of $9,489.34 and that therefore this taxpayer should recover from

49 the Collector of Internal Revenue, to whom said tax on said transaction was paid, or from the Government of the United States, such portion of the tax heretofore paid on said transaction as may be found to have been excessive when the fair value of said stock as of March 1, 1913, shall have been determined and the tax on the basis thereof shall have been recomputed.

10. Protestant, while insisting for the reasons among others above stated, that the valuation of said stock as of March 1, 1913, made by the Department as aforesaid and approved by the Sec-

retary of the Treasury should stand, yet if for any reason a re-valuation shall be had protestant will insist that said stock as valued by the Department as aforesaid, was grossly undervalued and that she was required to and did pay an excessive tax upon an alleged excessive profit arising from said sale, and she will claim the right to a refund of said tax to the extent of such excess. Considering the laches of the Department and the fraud (actual or constructive) perpetuated upon protestant, she will also claim that the running of the statute of limitations against her right to said refund is postponed until a reasonable time after any such re-valuation.

You are likewise advised that this taxpayer will make claim for the refund of the deficiency tax herewith paid and should such refund be denied she will bring legal proceedings to recover same and for such other and further relief to which she may be entitled.

Your very truly,

ALICE G. KALES.

On April 6, 1925, the Commissioner wrote plaintiff as follows:

APRIL 6, 1925.

MRS. ALICE H. KALES,
c/o Beaumont, Smith & Harris,
1122 Ford Building, Detroit, Michigan.

MADAM: This office is in receipt of your protest against
50 the assessment of deficiency in tax as levied against you for the year 1919 in the amount of $2,627,309.05.

In reply, you are advised that in view of the fact that the Statutory period within which the Commission might assess additional taxes for the year 1919 was about to expire, it was necessary in order to protect the interest of the Government to make an immediate assessment under the provisions of Section 274 (d) of the Revenue Act of 1924. Under the provisions of Section 279 (a) of the Revenue Act of 1924 a claim for abatement may be filed within ten days after the issuance of the demand notice by the Collector.

When the claim has been received in this office, it will be assembled with the case and given prompt consideration.

Inasmuch as the records of this office fail to disclose the receipt of power of attorney authorizing Beaumont, Smith and Harris to represent you in matters pertaining to your income tax liability, the information is furnished you direct.

Respectfully,

G. J. BRIGHT,
Deputy Commissioner.

It is the opinion of this Court that the plaintiff's said letter of March 24, 1925, is not a claim for refund, informal, defective, or otherwise, but is merely a protest with a statement of intention to later file a claim, in the event certain contingencies happen in the future. Nowhere in said letter does plaintiff claim a refund, no demand is made for the return of any tax paid, and it is not under oath. The letter calls for no action on the part of the Commissioner, but only contemplates possible future action by plaintiff. At best it is merely an expression of an intention that she will claim an additional amount, in the future, under certain conditions.

The record is devoid of anything showing that the Commissioner of Internal Revenue or the taxpayer acted upon it or in any way regarded it as other than a protest. Commissioner's letter of April 6, 1925 clearly shows that he treated it merely as a protest and informed plaintiff of her right to file a claim in abatement. The Courts have consistently held that pro-
51 tests could not be considered as informal claims for refund.

See Semmes Motor Co. v. United States, 67 C. Cls. 631;

Mutual Trust Life Ins. Co. v. United States, 45 F. (2) 288;

Pine Hill Crystal Spring Water Co. v. United States, 58 F. (2) 506;

Anderson v. United States, 6 F. Supp. 851;

International Arms & Fuse Co. v. United States, 37 F (2) 771.

As was said by the Circuit Court of Appeals for the Second Circuit in Art Metal Const. Co. v. United States, 47 F. (2) 558, certiorari denied, 283 U. S. 863:

"To allow him (the taxpayer) to substitute, not a claim, but a warning that he may in the future make a claim which is all on any theory that the supposed claim was—substantially dispenses with the statute altogether."

It is also significant that in the last paragraph of said letter of protest plaintiff states definitely that she would make claim for refund for the deficiency tax therewith paid, and shortly thereafter, to-wit, June 4, 1925, she did file a claim for refund for $2,627,309.05, being the full amount paid by plaintiff under said protest, but, made no mention of amount claimed here. If plaintiff had considered said protest a claim for refund it would have been unnecessary to file such. However, the fact that she did file such claim for refund shows that plaintiff did not consider such protest a claim for refund. She took no action and filed no claim for refund for the tax here involved until September 1928, after the Board of Tax Appeals determined the March 1, 1913 value to be $10,000.00 per share. It would appear that

plaintiff determined to claim further refund after the Board of Tax Appeals had found the March 1, 1913 value to be $10,000.00, which would be perfectly proper were it not for the statute of limitations.

Plaintiff has laid much stress upon the fact that the Commissioner never rejected or acted upon plaintiff's protest prior to filing what it called an amended claim for refund in September of 1928. It seems to the Court that Commissioner's letter of April 6, 1925 is all that such claim calls for and the fact
52 that nothing further was done in regard thereto shows that it was never treated by the Commissioner as a claim for refund.

The Courts have been quite lenient in allowing amendments to cure formal defects in imperfect or defective claims for refund. However no case is cited by plaintiff and I know of none in which the Courts have construed an intention to file a refund as the actual filing of such. The case of Waters v. United States, 12 Fed. Supp. 658, is very similar to the instant case. There the District Court for the Western District of Michigan held that a letter from a taxpayer protesting additional income taxes and stating taxpayer intended to file claim for refund was not an informal or defective claim sufficient to stop the running of the statute of limitations. The Court said:

"As stated, the record fails to disclose evidence that the commissioner treated the letter in the present case as a claim for refund. In not so regarding it, he was justified by the plain language of the letter and by the conduct of the taxpayer in failure to file claim for refund for over four years thereafter. By express terms of the letter, the only action contemplated or called for was by the taxpayer himself. It fails to request action or to suggest the need for action on the part of the commissioner.

"While the rule has long prevailed that revenue laws are to be construed strictly in favor of the taxpayer and against the taxing power, it would be folly to hold generally that the mere expression of an intention to file a claim constitutes the filing of such claim. To attribute such a forced and artificial sense to the word 'intend' would be to invite an avalanche of litigation based upon ill-founded and irrelevant statements gleaned from correspondence which at the time of its inception had no bearing upon the contentions later made."

This case was affirmed by the Circuit Court of Appeals for the Sixth Circuit without opinion, and I think that decision is binding on this Court. In the case at bar, as in the Waters case, by the express terms of the letter of protest, the only action contemplated was called for by the taxpayer herself. It fails to

request action or suggest the need for action on the part of the Commissioner.

53 It has been clearly established that the filing of a timely claim for refund is a condition precedent to the right to recover overpayment of income tax. The sovereign has imposed this as a condition upon which it consents to be sued and this Court must abide thereby. Rock Island & C. R. R. v. United States, 254 U. S. 141; Rand v. United States, 249 U. S. 503; Aladdin Co. v. Woodworth, 43 F. (2d) 150 (E. D. Mich. N. D.) and cases therein cited.

I must, therefore, conclude that plaintiff's letter of protest of March 24, 1925, did not constitute an informal or defective claim for refund subject to amendment, and that the first claim for refund was that filed in September of 1928, which was more than five years after payment as allowed by Section 284 (h) of the Revenue Act of 1926 expired and hence plaintiff's cause of action is barred by Section 3226 of Revised Statutes and must be dismissed.

It is unnecessary to decide the other points raised by plaintiff's motion to dismiss.

ERNEST A. O'BRIEN,
United States District Judge.

Dated February 18, 1939.

In United States District Court

Order of dismissal

Entered February 27, 1939

54 This cause having come on to be heard upon motion of the defendant to dismiss plaintiff's cause of action, and arguments having been made by both parties and briefs having been submitted, and the Court being fully advised in the premises, and having given full consideration to said arguments and briefs, and having entered its opinion herein, deciding that said cause of action should be dismissed.

Therefore, on motion of J. Thomas Smith, Assistant United States Attorney, attorney for defendant,

It is ordered, adjudged and decreed that the defendant's motion to dismiss be and the same is hereby granted, and that said cause of action be and the same is hereby dismissed.

ERNEST A. O'BRIEN,
United States District Judge.

In United States District Court

Notice of appeal

Filed May 3, 1939

To the above named defendant:

Notice is hereby given thtat Alice G. Kales, plaintiff above named, hereby appeals to the United States Circuit Court of Appeals for the Sixth Circuit, from the final order dismissing plaintiff's cause of action filed and entered in this action on February 27, 1939.

BEAUMONT, SMITH & HARRIS,
Attorneys for Alice G. Kales,
2900 Union Guardian Building, Detroit, Michigan.

Dated May 3rd, 1939.

35 In United States District Court

Appellant's designation of contents of record on appeal and statement of points to be relied upon

Filed May 4, 1939

Comes now the Appellant in the above entitled cause and hereby designates the following portions of the record, proceedings and evidence to be contained in the record on appeal:

1. Calendar entries.
2. Plaintiff's Petition filed July 7, 1936.
3. Proof of Service on the Attorney General filed July 20, 1936.
4. Proof of Service on United States Attorney filed July 20, 1936.
5. Special Appearance of United States of America.
6. Defendant's Motion to Strike paragraph 3 (j) of Plaintiff's Petition filed September 28, 1936.
7. Defendant's Motion to Make More Definite and Certain, filed September 28, 1936.
8. Order Granting Defendant's Motion to Strike, entered October 19, 1936.
9. Order Granting Defendant's Motion to Make More Definite and Certain, entered October 19, 1936.
10. Plaintiff's Amended Petition, filed November 2, 1936.
11. Defendant's Motion to Dismiss, filed December 4, 1936.

12. Affidavit in Opposition to Motion to Dismiss filed January 14, 1937.

13. Opinion of the Court filed February 18, 1939.

14. Order of Dismissal filed and entered February 27, 1939.

Appellant states that the points she intends to rely upon are as follows:

(a) The Court erred in granting Defendant's Motion to Dismiss.

(b) The Court erred in concluding that Plaintiff's letter
56 filed with the Commissioner on March 24, 1925 (Exhibit B attached to Plaintiff's Amended Petition) did not constitute an informal or defective claim for refund subject to amendment, but was merely a protest with a statement of intention to later file a claim in the event certain contingencies happened in the future.

(c) The Court erred in concluding that Plaintiff's cause of action was barred by Section 3226 of the Revised Statutes, and must be dismissed.

(d) The Court erred in concluding that the record was devoid of anything showing that the Commissioner of Internal Revenue or the taxpayer acted upon said letter of March 24, 1925, or in any way regarded it as other than a protest; whereas it is specifically alleged in paragraph 3 (n) of the Amended Petition, that the Bureau of Internal Revenue, through its General Counsel and its officers and agents, had always treated the amendment (Exhibit D attached to Plaintiff's Amended Petition) and the refund claim of March 24, 1925 as claims, from the time they were filed. Said conclusion is also contrary to the allegations contained in paragraph 3 (m), wherein it is alleged that a hearing was held on the amended refund claim of March 24, 1925 before the General Counsel for the Bureau of Internal Revenue on June 13, 1929, and to the statements of fact contained in the affidavit filed in opposition to the motion to dismiss, in which affidavit it is stated that at said hearing the General Counsel for the Bureau of Internal Revenue stated "that they were satisfied that said protest was sufficient to constitute an informal claim for refund, and that it was filed within the statutory period," and in which affidavit it also stated that a member of the staff of the General Counsel for the Bureau of Internal Revenue had recommended to the former General Counsel Charest, that plaintiff's claim for refund be allowed. The aforesaid conclusion is also contrary to the recitals contained in Exhibits E, F, G, H and L, wherein it appears that from June 5, 1929 up to and including August 20, 1935, said

letter of March 24, 1925 was repeatedly referred to and treated as a refund claim.

(e) The Court erred in concluding that the refund claim filed on June 4, 1925 in the amount of $2,627,309.05 made no mention of the amount claimed in this suit, whereas the provisions of said refund claim of June 4, 1925 are not set
57 forth in the pleadings or in any documents filed in said cause, and necessarily the Court could not know what said refund claim of June 4, 1925, did or did not contain until the same is introduced in evidence on the trial of said cause.

(f) The Court erred in concluding that if plaintiff had considered said protest of March 24, 1925, as a claim for refund, it would have been unnecessary to have filed the refund claim of June 4, 1925.

(g) The Court erred in concluding that plaintiff's first claim for refund was that filed in September 1928 and hence plaintiff's cause of action was barred by Section 3226 of the Revised Statutes and must be dismissed.

(h) The Court erred in granting Defendant's Motion to Strike the allegations in paragraph 3 (j) of Plaintiff's original petition.

(i) The Court erred in granting Defendant's Motion to Make More Definite and Certain, and in ordering plaintiff to attach to her petition a copy of the protest or claim for refund filed on March 24, 1925 (Exhibit B attached to Plaintiff's Amended Petition), and to attach a copy of the communication received by plaintiff from the Commissioner of Internal Revenue acting upon said protest or claim for refund (Exhibit C attached to Plaintiff's Amended Petition).

Dated May 3rd, 1939.

BEAUMONT, SMITH & HARRIS,
Attorneys for Appellant, Alice G. Kales,
2900 Union Guardian Bldg., Detroit, Michigan.

Service of Appellant's Designation of Contents of Record on Appeal and Statement of Points to be Relied Upon is hereby acknowledged this 3rd day of May, A. D. 1939.

JOHN C. LEHR,
United States Attorney,
By J. THOMAS SMITH,
Assistant United States Attorney,
Attorneys for Defendant and Appellee.

58 In United States District Court

Stipulation re abridgement of transcript of record and waiver of comparison thereof

Filed June 1, 1939

It is hereby stipulated by and between the attorneys for the respective parties hereto, that plaintiff's original Petition may be abridged in the printed record to omit the parts thereof appearing in plaintiff's Amended Petition and in defendant's Motion to Strike.

It is further stipulated and agreed that the Transcript of Record as presented to the Clerk by the printer may be certified by the Clerk of the District Court for the Eastern District of Michigan to the United States Circuit Court of Appeals for the Sixth Circuit, as a true, full, and complete copy of the original pleadings, papers, and orders in said cause, without further comparison by the Clerk.

BEAUMONT, SMITH & HARRIS,
Attorneys for Appellant.

JOHN C. LEHR,
United States Attorney,

By J. THOMAS SMITH,
Assistant United States Attorney,
Attorneys for Appellee.

Dated Detroit, Michigan, May 31, 1939.

59 Clerk's certificate to foregoing transcript omitted in printing.

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

Cause argued and submitted

October 14, 1940

Before SIMONS, ALLEN, AND HAMILTON, JJ.

This cause is argued by L. A. Masselink and Hal H. Smith for Appellant and by M. S. Zimmerman for Appellee and is submitted to the court.

Judgment

Entered November 9, 1940

Appeal from the District Court of the United States for the Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed for proceedings consistent with the opinion of this court.

Opinion

Filed November 9, 1940

Filed Nov. 9, 1940. John W. Menzies, Clerk.

United States Circuit Court of Appeals, Sixth Circuit

No. 8341

ALICE GRAY KALES, APPELLANT

v.

THE UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Eastern District of Michigan, Southern Division

Decided November 9, 1940

Before SIMONS, ALLEN, and HAMILTON, Circuit Judges.

HAMILTON, Circuit Judge. Appellant's action to recover income taxes alleged to have been overpaid for the calendar year 1919

was dismissed, from which order she prosecutes this appeal. The facts out of which the controversy arises are undisputed and substantially as follows:

Prior to March 1, 1913, appellant was the owner of 535 shares of Ford Motor Company stock. Its majority stockholder made an offer to purchase the stock of the minority and on or about May 19, 1919, the Commissioner of Internal Revenue, at the request of the stockholders, determined the March 1, 1913, value of each share to be $9,489.34. Thereafter on July 7, 1919, appellant sold her stock for $12,500.00 per share and on March 25, 1920, filed her income tax return for the calendar year 1919 and reported the profit on the sale in accordance with the Commissioner's determination of March 1, 1913, value, showing taxes due in the amount of $1,216,086.26, which she paid to the Collector of Internal Revenue in quarterly installments.

In March 1925, the Commissioner of Internal Revenue, on audit and review of her return, redetermined the March 1, 1913, value of the stock to be $2,634.00 per share and accordingly made a jeopardy deficiency assessment against her of $2,627,309.05, all of which she paid to the Collector of Internal Revenue under protest, at which time she addressed and mailed a letter to him and sent a copy to the Commissioner, the first eight paragraphs of which stated grounds of protest against the payment of the assessment. Paragraphs 9 and 10 related to an overpayment on her original return and are material to the question here.[1]

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[1] "9. This taxpayer further advises you and the Commissioner of Internal Revenue and the United States Government, that, while it is her position that the deficiency assessment is so illegal and void, as is set forth in paragraphs 1 to 8 above, and is likewise illegal and void and contrary to law for other reasons, that if it should be held either by the Internal Revenue Department, on the hearing of a claim for refund or otherwise, or by the Board of Appeals, or by any other Board or body having jurisdiction thereof to which this controversy should be submitted, or by any court of competent jurisdiction thereof, that the former assessment as made by Commissioner Daniel C. Roper should be set aside and vacated, and that the March 1, 1913, value of the said Ford Motor Company stock as fixed by Daniel C. Roper, Commissioner of Internal Revenue, and his finding and determination as to same shall be vacated, set aside, reopened or reversed, and the contentions of this taxpayer as heretofore set forth be overruled then this taxpayer will show and claim and insist that the valuation of $9,489.34 on each share of Ford Motor Company stock fixed by the said Daniel C. Roper, Commissioner of Internal Revenue, is substantially less than the fair value of said stock on the basic date, and that the said stock was greatly undervalued by the Commissioner and that the fair value of said stock per share as of March 1st, 1913, was greatly in excess of $9,489.34, and that therefore this taxpayer should recover from the Collector of Internal Revenue, to whom said tax on said transaction was paid, or from the Government of the United States, such portion of the tax heretofore paid on said transaction as may be found to have been excessive when the fair value of said stock as of March 1, 1913, shall have been determined and the tax on the basis thereof shall have been recomputed.

"10. Protestant, while insisting for the reasons among others above stated, that the valuation of said stock as of March 1, 1913, made by the Department as aforesaid and approved by the Secretary of the Treasury should stand, yet if for any reason a revaluation shall be had protestant will insist that said stock as valued by the Department as aforesaid, was grossly undervalued and that she was required to and did pay an excessive tax upon an alleged excessive profit arising from said sale, and she will claim the right to a refund of said tax to the extent of such excess. Considering the laches of the Department and the fraud (actual or constructive) perpetrated upon protestant, she will also claim that the running of the statute of limitations against her right to said refund is postponed until a reasonable time after any such revaluation."

On April 6, 1925, the Commissioner advised the appellant that his office was in receipt of her protest against the assessment of the deficiency in taxes as levied against her for the year 1919 in the amount of $2,627,309.05, but in view of the fact that the statutory time for collection was about to expire, an immediate assessment was imperative and she could file a claim of abatement with the Collector in ten days, which would be given prompt consideration. On June 4, 1925, appellant filed with the Commissioner a claim for refund for the $2,627,309.05 additional assessment, which was rejected, and she sued and recovered that amount against the Collector to whom it had been paid. Woodworth v. Kales, 26 F. 178 (C. C. A. 6).

On May 5, 1928, the Board of Tax Appeals, in the case of Couzens (another stockholder of the Ford Motor Company), 11 B. T. A. 1040, fixed the March 1, 1913, value of the Ford stock at $10,000.00 per share and on September 24, 1928, appellant filed with the Commissioner, on a form provided by him, what she designated "amendment to claim for refund filed March 24, 1925," in which she adopted the findings of the Board of Tax Appeals as to the March 1, 1913, value of the stock as found in the Couzens case, which showed an overpayment of taxes on her original return of $195,710.44. This claim was retained in the Commissioner's office and thereafter several conferences were had with the General Counsel's office in the Bureau with relation to it. On August 20, 1935, the Commissioner advised the appellant that the records of the Bureau indicated that she had filed a judgment claim dated September 2, 1928, in the sum of $2,627,309.05 based upon the decision in the District Court of Michigan, affirmed by this court on May 10, 1928, and that she had also filed September 21, 1928, a form purporting to be an amendment to a claim for refund filed March 24, 1925, seeking a further refund of $195,710.44. He advised that the refund claim filed in 1925 was merged into the judgment secured and that she was therefore precluded from filing an amendment to the earlier claim, which had been finally adjudicated, and since the so-called amendment was not treated as a claim, there was no necessity for a disallowance.

Appellant instituted this action July 7, 1936, and on motion of appellee, it was dismissed on the ground that her claim was barred by the Statute of Limitations; hence this appeal.

Two issues are presented: (1) Whether appellant's letter of March 24, 1925, to the Collector of Internal Revenue constituted an informal claim for refund, and (2) If such letter constituted such claim, whether it was rejected by the letter of the Commissioner of Internal Revenue dated April 6, 1925.

R. S. 3226, as amended, U. S. C. A. Title 26, Sec. 1672, Internal Revenue Code, 3772, provides no suit or proceeding shall be maintained in any court for the recovery of any Internal Revenue tax until a claim for refund has been duly filed with the Commissioner of Internal Revenue in accordance with the law and regulations.

R. S. 3228, as amended, U. S. C. A. Title 26, Sec. 4433, Internal Revenue Code, 322 (b) (1) provides that no refund shall be allowed unless before the expiration of a period of four years from the time the tax was paid a claim therefor has been filed by the taxpayer. Section 284 (h) of the Revenue Act of 1926 (44 Stat. 9) extends the time for the filing of claim for refund for 1919 taxes to five years from the date the return was due. Treasury Regulations 65, Article 1396, promulgated under the Revenue Act of 1934 and applicable here, provides that claims by the taxpayer for the refunding of taxes shall be made on form 843 and all facts relied on under the claim should be clearly set forth under oath. Treasury Decision 4266, promulgated March 27, 1929, authorizes the Commissioner to make a refund after the expiration of the statutory period of limitation, even if no formal claim has been filed prior thereto, in any case in which an informal or defective claim duly filed prior to the expiration of the period of limitation and stating specifically the grounds for the refund, is perfected by the filing of a claim prior to May 1, 1929.

It is settled law that where a claim rejectable as too general and as omitting to specify matters needing investigation has not misled the Commissioner, but has been the basis of an investigation disclosing facts necessary to his action in making a refund, an amendment which merely makes more definite the matters already within his knowledge, is permissible. United States v. Andrews, 302 U. S. 517, 534.

In the administration of Internal Revenue Laws, we are concerned with substance and not form. The prerequisite refunding statutes requiring claim for refund before suit, should receive a practical construction to effectuate their purpose. The income tax law is complex and does not always permit a determination of the taxpayer's liability in the first instance. Inevitable mistakes occur. Statutory provision is made for the adjustment of the tax where understated by the taxpayer and as a corollary a statutory method is provided to relieve a taxpayer from overstatements. It is vital to the functions of government that taxes be collected promptly and if errors in returns are made that they be expeditiously corrected. To this end the statute requires the taxpayer to make a timely charge of overpayment with grounds therefor, that the government may make investigation and refund the amount due, if any, without being subjected to the delay and expense of litigation and any timely claim showing intention to ask a refund

of taxes allegedly overpaid and the grounds therefor is sufficient to answer that purpose.

In considering the sufficiency of the claim, proper consideration should be given to its spirit and purpose and the surrounding facts and circumstances in the light of the statute. Applying this rule to the case at bar, appellant stated in her letter that she protested the assessment of the deficiency and was paying it under duress and solely to prevent the imposition of penalties and threatened attachment of her property.

The first eight paragraphs of her letter recited the fact that in making her original return she had accepted the Commissioner's March 1, 1913, value of the Ford stock in good faith and relied on it in making the sale and for that reason the United States was estopped from reopening, reversing or setting aside the previous determination of the value of the stock by the Commissioner.

In appellant's action for the recovery of the deficiency assessment, she relied on three grounds, (1) estoppel in her favor against the later attempted revaluation, (2) that the assessment made by the Commissioner for 1919 based upon this valuation and its later approval by his office, established that value beyond the power to reopen and reconsider except for a good cause which was nonexistent, and (3) that the deficiency of 1925 which had required the disputed payment, was void for lack of jurisdictional basis, and she was sustained by this court on the second ground. Woodworth v. Kales, supra. That action was against the Collector of Internal Revenue to whom she had paid the deficiency and as the original tax which she now seeks to recover was paid to another Collector, she could not have litigated in her former action the issue she now raises. Smietanka v. Indiana Steel Company, 257 U. S. 1; Routzahn v. The Reeves Bros. Company, 59 F. (2d) 915 (C. C. A. 6).

Paragraphs 9 and 10 of the letter were alternatives to paragraphs 1 to and including 8. In substance, appellant stated that if the Internal Revenue Bureau, the Board of Tax Appeals or any court having jurisdiction of the subject matter, should decide that the United States was authorized to change the valuation fixed by the Commissioner of Internal Revenue before she sold her stock, then she had the right, and would show, that the valuation so fixed was substantially less than the fair market value of the stock March 1, 1913, and that she was entitled to recover such portion of the tax as was originally paid by her due to the undervaluing of the stock.

Appellant's letter was more than a protest or a statement of an intention to file a claim later in the event certain contingencies should arise. It was clear notice to the Commissioner that if he reversed his decision as to the value of the stock she was claiming

a refund of that part of the original tax paid by her, because of her March 1, 1913, undervaluation of the stock. Her statement was in the nature of a counterclaim. The claim she urges here did not mature until the March 1, 1913, value of the stock as previously determined by the Commissioner was changed by his office, the Board of Tax Appeals or some court of competent jurisdiction. A taxpayer may state as many grounds for refund as he wishes regardless of consistency, provided facts are disclosed on which the Commissioner may act. Compare Reynolds v. McMurray, 77 F. (2d) 740 (C. C. A. 10); Ferguson v. United States, 27 F. Supp. 1012, Ct. Cl.

There is a class of claims for refundment of taxes in which, through no fault of his own and often through the fault of the Commissioner, the taxpayer does not know which of two or more inconsistent grounds he may succeed in proving, either of which will entitle him to refundment. In such cases, the taxpayer cannot allege facts without qualification but may state them in the alternative so that the Commissioner, in considering his grounds, will not be left in the dark as to the facts on which the taxpayer relies, but within limits, which would exclude abuses, the right of the taxpayer to set up alternative grounds for refundment is clearly recognized. The analogy is found in General Rules of Pleading [Rule 8 (e) of Federal Rules of Civil Procedure]; United States v. Richards, 79 F. (2d) 797 (C. C. A. 6).

The appellant's claim falls clearly within the above classification. She was willing to let the Commissioner's former determination of the March 1, 1913, value of the stock stand, but if he proposed to re-examine and withdraw his former decision, she proposed, in the alternative, to show facts which would be to her advantage. The Commissioner re-examined the whole subject matter and in so doing was required to redetermine the March 1913 value of the stock as though it had not theretofore been done.

We are of the opinion that appellant's letter of March 24, 1925, constituted an informal claim, which the Commissioner did not reject for failure to comply with the Treasury Regulations and when considered in the light of all the facts and circumstances existing at the time, the formal refund claim filed by appellant September 11, 1928, and accepted and considered on its merits by the Commissioner, was but a perfection of the informal claim and not a new and independent one. Night Hawk Leasing Company v. United States, 18 F. Supp. 938, Ct. Cl. 1; Lasher v. United States, 65 Ct. Cl. 295; In re Baltimore Pearl Hominy Company, 5 F. (2d) 553 (C. C. A. 4); United States v. Factors Finance Company, 288 U. S. 89, 94. Compare Georgia, Florida & Alabama Railway Company v. Blish Company, 241 U. S. 198.

The case of Waters v. United States, 12 Fed. Supp. 658, relied on by appellee is not applicable here. There the Commissioner assessed the tax deficiency; the taxpayer wrote a letter of protest without paying the tax in which it was stated: "I intend to file claims for refund immediately for these additional taxes." The tax not having been paid at the time the letter was written, it could not be characterized as a claim for refund. In the case at bar all the taxes had been paid at the time the letter was written and no reference in it could be construed fairly as applying to unpaid taxes.

Appellee's contention that the Commissioner's letter of April 6, 1925, constituted a rejection of appellant's informal claim is without merit. This communication, when fairly construed, relates exclusively to the additional assessment referred to in the first eight paragraphs of her letter. The Commissioner advised appellant that, under the provisions of Section 279 (a) of the Revenue Act of 1924, she could file a claim for abatement within ten days. A claim in abatement is applicable only to taxes which have been assessed and not yet paid. Construing the letter in the light of the Statute, it is clear that the Commissioner's office labored under the misapprehension appellant had not paid the deficiency assessment. The letter made no reference either directly or indirectly to paragraphs 9 and 10 of appellant's communication of March 24, 1925, which related entirely to taxes voluntarily paid on her original return.

The Internal Revenue Bureau accepted appellant's amendment to her informal claim and considered it on its merits and finally rejected it on a ground abandoned in this action and we are of the opinion that her cause of action was not barred by any applicable statute of limitation.

Judgment reversed for proceedings consistent with this opinion.

Petition for rehearing

Filed December 4, 1940

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Order denying petition for rehearing

Entered December 10, 1940

Appellee's petition for rehearing is denied.

United States Circuit Court of Appeals for the Sixth Circuit

I, J. W. Menzies, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of record and proceedings in the case of Alice Gray Kales vs. United States of America, No. 8341, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 28th day of February A. D. 1941.

[SEAL] J. W. MENZIES,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

Supreme Court of the United States

Order allowing certiorari

Filed April 28, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The Chief Justice took no part in the consideration and decision of this application.

[Endorsement on cover:] File No. 45,175. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 826. The United States of America, Petitioner, vs. Alice Gray Kales. Petition for a writ of certiorari and exhibit thereto. Filed March 8, 1941. Term No. 826 O. T. 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1941

No. —

In the Supreme Court of the United States

OCTOBER TERM, 1940

THE UNITED STATES OF AMERICA, PETITIONER

v.

ALICE GRAY KALES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In the Supreme Court of the United States

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No. —

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ALICE GRAY KALES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered in the above cause on November 9, 1940.

OPINIONS BELOW

The opinion of the District Court (R. 45–53) is not officially reported. The opinion of the United States Circuit Court of Appeals for the Sixth Circuit is reported in 115 F. (2d) 497.

JURISDICTION

The judgment of the United States Circuit Court of Appeals was entered November 9, 1940. The Government's petition for rehearing was denied on

December 10, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

In 26 F. (2d) 178 the court below awarded the taxpayer a refund of income taxes for the year 1919 based upon the March 1, 1913, value of certain Ford Motor Company stock sold by her in 1919. She subsequently brought this suit for an additional refund for the same year, with respect to the same sale, and seeks the additional refund based upon an even higher valuation of that stock. In opposing the maintenance of this suit, a number of technical questions are raised which may conveniently be summarized as follows:

1. Whether the present suit is founded upon a timely claim for refund; whether a certain unsworn letter of March 23, 1925, written by the taxpayer to the collector, even if otherwise a valid claim for refund, was merged with and became extinguished by the judgment in the earlier suit.

2. Whether that letter, in any event, is not a claim for refund, since it fails to make any present claim and merely announces that the taxpayer *will* make a claim for refund in the future.

3. Whether that letter fails to qualify as a valid claim for refund because of certain conditions which taxpayer attached thereto.

4. Whether the maintenance of this suit involves splitting a single cause of action which is

not permitted under the statutory scheme for litigating Federal taxes.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved will be found in the Appendix, *infra*, pp. 17–20.

STATEMENT

This suit is against the United States to recover an alleged overpayment of income taxes for the year 1919 in the amount of $195,710.44, with interest as provided by law (R. 17). The District Court granted the Government's motion to dismiss the amended petition (R. 53–54). On appeal, the Circuit Court of Appeals reversed the judgment and denied the Government's petition for rehearing.

The amended petition alleged, among others, the following facts (R. 12–18):

Taxpayer filed her income tax return for the calendar year 1919, reporting therein income realized by her upon the sale of stock of the Ford Motor Company, treating the cost basis of that stock as its March 1, 1913, value, in the amount of $9,489.34 per share. This value was in accordance with a prior determination of the Commissioner of Internal Revenue. The tax shown on the return was paid in four installments, the last of which occurred on December 15, 1920 (R. 12–13). In March 1925, the Commissioner of Internal Revenue redetermined the March 1, 1913,

value of the stock to be less than previously determined, and accordingly made a jeopardy deficiency assessment against the taxpayer in the amount of $2,627,309.05. This jeopardy assessment was paid by the taxpayer on March 24, 1925, under a letter of protest dated March 2[illegible], 1925, addressed to the Collector of Internal Revenue (R. 14, 19–24).

The letter consisted of 2 unnumbered introductory paragraphs, 10 numbered paragraphs and a final unnumbered paragraph. The two introductory paragraphs complained generally of the deficiency assessment and stated that the taxpayer protested "for the following particular reasons". There followed the 10 numbered paragraphs,[1] and the letter concluded with an unnumbered paragraph in which the taxpayer announced that she "will make claim for the refund of the deficiency tax herewith paid." and that she would bring appropriate legal proceedings if such claim for refund be denied (R. 19–24).

In accordance with that announced intention, the taxpayer, on June 4, 1925, did file a claim for refund in the amount of $2,627,309.05, comprising

[1] The gist of the various numbered paragraphs is that the valuation originally approved by the previous Commissioner could not be reopened for redetermination. Paragraphs numbered 9 and 10 state further that if it be held that the earlier determination could be reopened, then the taxpayer will claim an even higher valuation for the stock than that upon the basis of which her 1919 returns were originally filed.

the amount of the jeopardy assessment paid on March 24, 1925 (R. 14–15). That claim of the taxpayer was litigated in the Circuit Court of Appeals for the Sixth Circuit. *Woodworth* v. *Kales*, 26 F. (2d) 178. In that claim and proceeding the taxpayer contended that the Commissioner of Internal Revenue was precluded from changing the first determination made as to the March 1, 1913, value of the Ford Motor Company stock, being $9,489.34 per share, and that contention was approved by both the District Court and the Circuit Court of Appeals in that suit (R. 15). The judgment claim filed by the taxpayer on September 24, 1928, comprising this judgment was satisfied, with interest, on November 13, 1928 (R. 15–16).

On September 24 1928, the taxpayer filed what purported to be an amendment to a claim for refund which was described as "the refund claim filed March 24, 1925," and which in fact was nothing more than the letter just outlined (R. 15, 26–29). In that "amendment" the taxpayer sought an additional refund for the year 1919 in the amount of $195,710.44 plus interest, based on the contention that the Ford stock had a March 1, 1913 value of $10,000 per share (R. 26–29).

The Treasury refused to make any additional refund (R. 34), and despite the taxpayer's subsequent transparent attempt to induce the Commissioner to "disallow" her "claim for refund" (cf. R. 35), she was informed that the Bureau of Inter-

nal Revenue did not regard her demand for additional refund as a claim for refund and that there was therefore no necessity for a disallowance (R. 37–38). She thereupon brought this suit in the District Court on July 7, 1936, which the District Court dismissed on motion of the Government.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the present suit is maintainable.

2. In holding that there was in existence at the time this suit was brought a valid claim for refund which could support this suit.

3. In holding that the taxpayer's letter dated March 23, 1925, constituted a claim for refund.

4. In failing to hold that such letter, even if a claim for refund, was merged with and extinguished by the judgment entered pursuant to the decision of the court below in 26 F. (2d) 178.

5. In failing to hold that such letter, even if otherwise a claim for refund and not extinguished by such prior suit, was fatally defective because of the conditions which the taxpayer specified therein

6. In failing to hold that the decision in the prior suit in any event foreclosed the maintenance of the present suit.

7. In failing to hold that the taxpayer's cause of action, if she had any, was barred by the statute of limitations.

8. In reversing the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

More than 12 years ago the court below entered a final judgment in favor of the respondent herein granting her a refund of income taxes for the year 1919 in the amount of $2,627,309.05 with interest. *Woodworth* v. *Kales*, 26 F. (2d) 178. That refund related solely to the computation of profit upon sale of certain Ford Motor Company stock by respondent in 1919; more specifically, it related to the determination of the March 1, 1913, value of the stock as a basis for computing the gain upon sale, and the refund was made upon the basis of a March 1, 1913, valuation of $9,489.24 per share. The present proceeding is also a suit for refund of respondent's 1919 income taxes, in which respondent seeks an additional refund of $197,710.44 with interest [2] based upon the identical sale of Ford stock in 1919 and is founded on the contention that the stock had a March 1, 1913, value of $10,000 per share.

The amazing decision of the court below in permitting respondent to bring this suit is such a departure from the usual course of judicial proceedings as to call for review by this Court. The

[2] The statutory interest rate of 6% per annum when applied from the year 1920, the date of payment of the taxes herein, would more than double the principal amount which respondent seeks to recover.

case is entangled in technical questions, each, possibly, of apparent narrowness in scope; but the entire picture revealed by exploring these technical questions carefully will disclose how far the court below has departed from the usual course of judicial proceedings and what potential means it has provided for astute tax counsel to litigate and relitigate liabilities for tax years which should long have been closed.

1. This suit is fatally defective because it is not founded upon a timely claim for refund.[3] The taxes which respondent seeks to recover were paid during the year 1920 (R. 13), and the time within which she could have filed claim for refund was, under Section 284 (b) and (a) of the Revenue Act of 1926, *infra*, p. 18, four years from the date of payment, or at most, five years from the date the return was due.[4] Thus, April 14, 1925, was the last day upon which respondent could have filed a timely claim. And under Article 1396 of Treasury Regulations 65, the regulations then in force, see Appendix, *infra*, p. 19, such claim was required to be filed on "Form 843." No such claim was ever filed by respondent prior to April 14, 1925, nor does

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[3] That the filing a timely claim for refund is a prerequisite to a suit for refund of federal taxes has often been recognized by this Court. See, e. g., *Rock Island &c. R. R.* v. *United States*, 254 U. S. 141; *United States* v. *Felt & Tarrant Co.*, 283 U. S. 269.

[4] The return for the year 1919 was due on March 15, 1920, and was, in this case, extended by the Collector for 30 days from March 15, 1920 (R. 13).

she contend that she filed any such claim. Her entire case rests upon a certain letter of protest dated March 23, 1925 (R. 19–24) which she addressed to the Collector of Internal Revenue and which accompanied the payment of a deficiency assessed by the Commissioner, which deficiency is not here in controversy. Her present contention is that that letter (as "amended" by an admittedly untimely claim dated September 24, 1928) constituted a claim for refund of the taxes which she now seeks to recover and is sufficient to support the present suit. The utter lack of any foundation for that position will be seen if that letter is read in its entirety and examined in the light of the surrounding circumstances.

On or about March 13 or 14, 1925, the Commissioner made a jeopardy assessment against respondent for the year 1919 in the amount of $2,627,309.05 on the ground that she had underpaid her taxes for that year by using an excessively high basis for her Ford Motor Company stock in computing gain on sale. Thereafter, on March 24, 1925, respondent paid that jeopardy assessment, and accompanied that payment with the letter of protest referred to above[2] (R. 19–24). The letter complained against the assessment of the deficiency, contending that her 1919 taxes had been

[2] That letter was dated March 23, 1925 (R. 19), and it is variously referred to as the letter of March 23 or March 24, 1925.

paid in accordance with a valuation of the Ford stock accepted by the Commissioner of Internal Revenue at that time, and that it was not open to the successor Commissioner or the Treasury Department to place any different valuation upon that stock. In paragraphs numbered 9 and 10 of the letter, she stated further that if the determination of the former Commissioner should be set aside, she would then undertake to show and claim that the value of the stock was even higher than originally determined. The letter concluded with a final un-numbered paragraph in which respondent declared that (R. 24) "this taxpayer *will* make claim for the refund of the deficiency tax herewith paid." [Italics supplied.]

Nowhere in the letter was there any indication that respondent was treating it as a claim for refund, or that she regarded it as anything more than a protest accompanied with a declaration of intention to file a claim for refund. And indeed, on June 4, 1925, she did file a claim for refund for $2,627,309.65 in accordance with the last paragraph of her letter of protest. She thereupon brought suit upon that claim and a refund in her favor was affirmed by the Circuit Court of Appeals (*Woodworth* v. *Kales*, 26 F. (2d) 178), on the ground that the valuation of the stock once having been determined by the Commissioner could not later be reopened. That judgment gave respondent everything that she demanded in her

letter of protest as well as in her June 4, 1925, claim. That letter was merely preliminary to or supplementary to the June 4, 1925, claim and was merged with and extinguished by the final judgment entered pursuant to the opinion in 26 F. (2d). Even if that letter might otherwise be regarded as an "informal" claim, it ceased to have any vitality as such after that litigation, and therefore cannot afford any foundation for the present suit.

2. But even if there had not been any such litigation as culminated in the opinion in 26 F. (2d) which extinguished the underlying claim, the unsworn letter of March 23, 1925, could not in any view be treated as a claim for refund of the taxes which respondent seeks here.

That letter was merely a letter of protest against the deficiency on the ground that the contested valuation had been finally determined by a previous Commissioner and could not be reopened. The first two unnumbered paragraphs, the first eight numbered paragraphs and the last unnumbered paragraph of the letter deal exclusively with the impropriety of the deficiency assessment and look toward the filing of a claim, which in fact was filed on June 4, 1925. Paragraphs numbered 9 and 10 are merely adjuncts to the primary protest, and simply announce that if the determination of the previous Commissioner is not final, respondent *will* claim an even higher valuation. But just as the

main part of the letter was not a claim for refund with respect to the deficiency, so these subsidiary paragraphs constituted at most a mere declaration of intention to make a claim at some later time.

In holding that the letter did constitute a claim for refund, the decision of the court below is in conflict in principle with *Art Metal Const. Co.* v. *United States*, 47 F. (2d) 558 (C. C. A. 2d), certiorari denied, 283 U. S. 863, where the Circuit Court of Appeals said (pp. 559, 560):

> The supposed claim was no claim at all; it was a mere caveat, an attempt to reserve the taxpayer's right at some later time to file a claim * * *
>
> * * * * *
>
> * * * To allow him [taxpayer] to substitute, not a claim, but a warning that he may in the future make a claim—which is all on any theory that the supposed claim was—substantially dispenses with the statute altogether. Presumably, it was to avoid exactly such resulting uncertainties that the act and the regulations required something definite enough for action. * * *

See also *Ordway* v. *United States*, 37 F. (2d) 19 (C. C. A. 2d); *Philipsborn* v. *United States*, 53 F. (2d) 133 (C. Cls.), certiorari denied, 285 U. S. 548. Cf. *Baltimore & Ohio R. R.* v. *United States*, 260 U. S. 565.

It seems quite plain both from the language of the letter and the circumstances surrounding it

that the taxpayer conveyed at most a warning that she might file a claim in the future.[6]

3. Moreover, even if the March 23, 1925, letter were an otherwise proper claim for refund, it would be invalid because of the conditions which respondent attached thereto. The court below held that the letter "was in the nature of a counterclaim" which "did not mature until the March 1, 1913, value of the stock, as previously determined by the Commissioner, was changed by his office, the Board of Tax Appeals or some court of competent jurisdiction."

Thus, the court treated the letter as a contingent claim, which completely suspended the statute of limitations until some future day when one of the contingencies specified by the taxpayer might occur. And the court has treated as such a contingency a subsequent decision of the Board of Tax Appeals in a proceeding to which she was a stranger.

It is a matter of great importance in the administration of the revenue laws to have this deci-

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[6] The decision of the court below is also in conflict with its May 15, 1935, *per curiam* affirmance of *Waters* v. *United States*, 12 F. Supp. 658 (W. D. Mich.). In that case it was held that a letter of protest accompanying the payment of tax could not be treated as a claim for refund. Although the court below states (R. —) that the tax in the *Waters* case was not paid at the time the letter was sent, the plain fact is that the payment was transmitted *simultaneously* with the letter, as noted by the District Court in the *Waters* case, 12 F. Supp. at 659.

sion reviewed. For, if the principle announced by the court below is generally followed, taxpayers would be permitted to suspend the statute of limitations operating against claims for refund by asserting that they will file claims in the future if and when various contingencies occur. If that proposition were correct there would have been no need for the enactment of Section 608 (b) (2) of the Revenue Act of 1928, authorizing an agreement in writing between the taxpayer and the Commissioner to suspend the statute of limitations for filing a suit for refund until final decision in one or more cases pending in either the courts or the Board of Tax Appeals. It is of substantial importance to the Commissioner in his administration of the tax laws that he be not forced to consider at his peril every informal assertion to him by a taxpayer as constituting a claim for refund.

4. Finally, the judgment in the former suit (26 F. (2d) 178) forecloses respondent from maintaining the present suit, even if the March 23, 1925, letter be regarded as a valid and independent claim for refund. To permit her to maintain this suit would be to permit her to split a cause of action. Her alleged cause of action is that she overpaid her taxes for the year 1919. Cf. *Lewis* v. *Reynolds*, 284 U. S. 281. In providing various alternative methods to litigate the correctness of Federal income taxes (i. e. in the District

Courts, the Court of Claims, or the Board of Tax Appeals), Congress could not have intended to permit a taxpayer to contest the same taxes in more than one forum, or to bring successive suits in the same forum.

That the taxes for any given year may furnish the basis for only one cause of action has been demonstrated in *Western Maryland Ry. Co.* v. *United States*, 23 F. Supp. 554 (Md.), where the court went even further and held that a prior suit for refund of taxes precluded a subsequent suit for refund of interest on those taxes which the taxpayer had likewise overpaid.

It is a matter of considerable importance to the Government that this question be finally settled by this Court. Otherwise, the Government might be harassed by a multiplicity of suits for the same tax year. It seems inconceivable that Congress intended liability for a single tax year to be kept in suspense until after the termination of a series of suits which could be expanded almost indefinitely by the ingenuity of counsel.[7]

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[7] It is perhaps true, as noted by the court below (R. ——), that in her suit against Collector Woodworth, respondent could not have asked for recovery of taxes paid to a predecessor collector. But she certainly could have brought a single suit against the United States in the Court of Claims for the full amount of any overpayment for the year 1919. That her *remedy* against Collector Woodworth permitted her to recover only on part of her cause of action does not justify splitting up the cause of action. Her remedy in the Court of Claims was complete.

As a result of the decision below, this case has been remanded to the District Court for a trial on the facts. The principal question of fact is the March 1, 1913, value of the Ford Motor Company stock. Since that stock was closely held, the trial undoubtedly would involve a valuation of the entire company as of that date, thus necessitating proceedings of unusual magnitude, and calling for the testimony of numerous expert witnesses that might well prolong this controversy for a considerable period. In view of the exceedingly doubtful propriety of maintaining this suit at all, the questions here presented should be passed upon by this Court, so that the Government may be spared the burden and expense of the protracted litigation which is threatened in the District Court, if the suit has not been properly brought.

CONCLUSION

Therefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

FRANCIS BIDDLE,
Solicitor General.

MARCH 1941.

APPENDIX

Revised Statutes, as amended:

SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates. (U. S. C., Title 26, Sec. 1672.)

SEC. 3228. (a) All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as otherwise provided

by law in the case of income, estate, and gift taxes, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum. * * * (U. S. C., Title 26, Sec. 1433.)

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 284. (b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefore is filed by the taxpayer; and

* * * * *

(h) Except as provided in subdivision (d) this section shall not (1) bar from allowance a claim for credit or refund filed prior to the enactment of this Act which but for such enactment would have been allowable, or (2) bar from allowance a claim in respect of a tax for the taxable year 1919 or 1920 if such claim is filed before the expiration of five years after the date the return was due.

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 608. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST TAXPAYER.

A refund of any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) made after the enactment of this Act, shall be considered erroneous—

* * * * *

(b) in the case of a claim filed within the proper time and disallowed by the Commissioner after the enactment of this Act, if the refund was made after the expiration of the period of limitation for filing suit, unless—

* * * * *

(2) within such period, the taxpayer and the Commissioner agreed in writing to suspend the running of the statute of limitations for filing suit from the date of the agreement to the date of final decision in one or more named cases then pending before the United States Board of Tax Appeals or the courts. (U. S. C., Title 26, sec. 1674.)

Treasury Regulations 65, promulgated under the Revenue Act of 1924:

ART. 1306. *Claims for refund of taxes erroneously collected.*—Claims by the taxpayer for the refunding of taxes, interest, penalties and additions to tax erroneously or illegally collected shall be made on Form 843. All facts relied upon in support of the claim should be clearly set forth under oath. * * *

T. D. 4266, VIII-1 Cum. Bull. 111 (promulgated March 27, 1929):

* * * * *

(2) A refund or credit may be allowed after the expiration of such statutory period of limitation, even if no formal claim has been filed prior thereto, in any case in which a so-called informal or defective claim, duly filed prior to the expiration of such period and stating specifically the grounds for the refund or credit, is perfected by the filing

of a claim prior to May 1, 1929, which complies with the requirements of Treasury Decision 4265, but (a) only the grounds set forth in such formal claim which were also set forth in such informal or defective claim will be considered, and (b) no claim in respect of which a suit in court has been commenced at any time may be so perfected.

U. S. GOVERNMENT PRINTING OFFICE 1941

No. 35

In the Supreme Court of the United States

OCTOBER TERM, 1941

THE UNITED STATES OF AMERICA, PETITIONER

v.

ALICE GRAY KALES

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 32–38) is unreported. The opinion of the Circuit Court of Appeals (R. 43–49) is reported in 115 F. (2d) 497.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 9, 1940 (R. 43). The petition of the United States for a rehearing was denied December 10, 1940 (R. 50). The petition for a writ of certiorari was filed March 8, 1941, and was granted April 28, 1941 (R. 51). The jurisdiction of this Court is conferred by

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

In a prior suit concluded 13 years ago, the taxpayer was awarded a large refund of income taxes for the year 1919 resulting from a recomputation of her profit upon her sale in 1919 of certain Ford Motor Company stock. In this suit she seeks an additional refund for the same year based upon a further recomputation of the profit upon the identical shares involved in the prior litigation. The basic question is whether this suit is maintainable and the answer depends upon:

1. Whether the present suit is founded upon a timely claim for refund; that is, whether a certain unsworn letter of March 23, 1925, written by the taxpayer to the collector, even if otherwise a valid claim for refund, was merged with and became extinguished by the judgment in the earlier suit.

2. Whether that letter, in any event, fails to constitute a claim for refund.

3. Whether the maintenance of this suit amounts to the splitting of a single cause of action, which is not permitted under the statutory scheme for litigating federal taxes; whether, in any event, the maintenance of this suit is forbidden by the cognate principle of *res judicata*.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved will be found in the Appendix, *infra*, pp. 44–49.

STATEMENT

This action was brought by the respondent against the United States in the United States District Court for the Eastern District of Michigan, to recover an alleged overpayment of income taxes for the year 1919 in the amount of $195,710.44, with interest (R. 2, 8–13). Upon motion of the United States (R. 26–27), the District Court dismissed the action (R. 38), but its judgment was reversed by the court below (R. 43).

The material facts, as alleged in the amended petition (R. 8–13), with the exhibits attached thereto (R. 13–26), may be stated as follows:

After having obtained from the Collector of Internal Revenue an extension of 30 days from March 15, 1920, for filing her income-tax return for the year 1919, the taxpayer filed her return on March 25, 1920. In that return she disclosed that during 1919 she had sold 525 shares of Ford Motor Company stock at $12,500 per share, and she computed her profit upon the basis of a March 1, 1913, value of $9,489.34 per share, which value was in accordance with a prior determination of the Commissioner of Internal Revenue. The tax shown to be due on the return, in the amount of $1,216,086.26, was paid by the taxpayer to Collector of Internal Revenue Gregan in four installments during the year 1920, on March 25, June 14, September 13, and December 15, 1920, respectively (R. 8–9).

In March 1925 the Commissioner of Internal Revenue redetermined the March 1, 1913, value of the stock to be less than previously determined and, upon the basis of the resultant increased profit from the sale, accordingly made a jeopardy deficiency assessment for the year 1919 against the taxpayer in the amount of $2,627,309.05. This jeopardy assessment was paid by the taxpayer on March 24, 1925, to Collector of Internal Revenue Woodworth, under a letter of protest dated March 23, 1925, addressed to the Collector, a duplicate of which was presented also to the Commissioner of Internal Revenue (R. 10).

The taxpayer's letter of protest of March 23, 1925, consisted of two unnumbered introductory paragraphs, ten numbered paragraphs, and a final unnumbered paragraph (Exhibit B, R. 14–18). The two introductory paragraphs complained generally of the deficiency assessment and stated that the taxpayer protested against it "for the following particular reasons" (R. 14). There followed the ten numbered paragraphs, which asserted the illegality of the deficiency assessment upon specific grounds, the gist of which was that the valuation of the stock originally made by the previous Commissioner could not be reopened for redetermination, and that the deficiency assessment resulting from such reopening and such redetermination of value was therefore illegal and void (R. 14–18). In paragraphs numbered nine and ten the taxpayer

stated further "that if it should be held" that the earlier determination could be reopened, "then" the taxpayer "will" claim an even higher valuation for the stock than that used in her 1919 return as the basis for her original computation of the profit on the sale, and that she "will" claim that she had paid an excessive tax thereon and "will claim the right to a refund of said tax to the extent of such excess" (R. 17–18). The letter concluded with an unnumbered paragraph in which the taxpayer announced that she "will make claim for the refund of the deficiency tax herewith paid" and that, if such refund be denied, "she will bring legal proceedings to recover same" (R. 18).

Accordingly, on June 4, 1925, the taxpayer filed a claim for refund in the amount of $2,627,309.05, which was the amount of the jeopardy deficiency assessment which had been paid under protest on March 24, 1925, to Collector Woodworth. Upon rejection of that claim, litigation ensued in which the taxpayer prevailed. *Woodworth* v. *Kales*, 26 F. (2d) 178 (C. C. A. 6th). In that claim for refund and in the subsequent litigation against Collector Woodworth, the taxpayer contended that the Commissioner of Internal Revenue was precluded from changing the first determination made as to the March 1, 1913, value of the Ford stock in the amount of $9.489.34 per share, and that the jeopardy deficiency assessment

of $2,627,309.05 was illegal and void. That contention was upheld by the District Court and on appeal that judgment was affirmed by the Circuit Court of Appeals on May 10, 1928. Thereafter, on September 24, 1928, the taxpayer filed a judgment claim thereon which, in the amount of $2,627,309.05, plus interest, was satisfied on November 13, 1928 (R. 10–11).

On September 24, 1928, the taxpayer filed a claim for refund (Exhibit D, R. 19–22) which she labelled an "Amendment" to a claim for a refund described as the "claim for refund filed March 24, 1925," which was in fact nothing more than the letter of protest (Exhibit B, R. 14–18) mentioned above. In that "Amendment", the taxpayer sought an additional refund of income taxes for the year 1919 in the amount of $195,710.44, plus interest, upon the ground that the Ford stock had a March 1, 1913, value of $10,000 per share (R. 11).

The Bureau of Internal Revenue refused to make any additional refund to the taxpayer. Following the taxpayer's attempts (R. 22–24) to obtain action upon her "claim," the Commissioner finally wrote her a letter dated June 4, 1935 (Exhibit I, R. 24), in which he referred to what was by her "apparently intended * * * to constitute a claim for refund of $195,710.44 income taxes for the year 1919," called attention to the judgment which had been entered in her favor for

an overpayment of her tax for the year 1919, which judgment had been satisfied, and advised her that the Bureau was therefore precluded "from giving further consideration in any respect" to her income-tax liability for the year 1919. Despite her subsequent effort (Exhibit J, R. 24) to induce the Commissioner to "disallow" her "claim for refund," she was finally advised by the Treasury Department, by a letter dated August 20, 1935 (Exhibit L, R. 25–26), that the "claim for refund" filed in 1925 was merged into the judgment, that she was precluded from filing an "amendment" and, finally, that the Bureau of Internal Revenue had "not considered or treated the so-called amendment as a claim," and that there was therefore no necessity for a disallowance—adding that the adjudication by the court had ended the matter insofar as administrative action was concerned, except to make the refund directed by the judgment (R. 11–12).

On July 7, 1936, the taxpayer instituted this suit in the District Court (R. 2). The United States moved to dismiss (R. 26–27) the amended petition (R. 8–13), asserting: Firstly, that the suit was not founded upon a timely claim for refund, since the letter of protest of March 23, 1925, did not constitute a claim for refund at all and therefore could not be "amended" by the untimely claim filed in 1928, and because, even if the letter of protest were considered a claim, it

had been rejected by the Commissioner's letter of April 6, 1925 (Exhibit C, R. 18); secondly, in the alternative, the action should be dismissed because, even if the letter of protest were considered as a claim, it had become extinguished by virtue of its merger with the judgment in the prior case.

The District Court granted the motion to dismiss (R. 38), holding (R. 32–38) that the letter of protest of March 23, 1925, was not a claim for refund, but merely a protest with a statement of intention later to file a claim upon certain future contingencies, and that it did not constitute an informal or defective claim which could be amended and that hence, since the claim filed in September 1928, was untimely, the action was barred by Section 3226 of the Revised Statutes. Having so concluded, the District Court found it unnecessary to consider the other points raised by the motion to dismiss (R. 38).

On appeal, the court below reversed the judgment of the District Court, holding that the letter of March 23, 1925, constituted an informal claim which was perfected by the formal claim filed in September 1928 and that consequently the taxpayer's cause of action was not barred by limitation (R. 43–49).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the present suit is maintainable.

2. In holding that there was in existence at the time this suit was brought a valid claim for refund which could support this suit.

3. In holding that the taxpayer's letter dated March 23, 1925, constituted a claim for refund.

4. In failing to hold that such letter, even if a claim for refund, was merged with and extinguished by the judgment entered pursuant to the decision of the court below in 26 F. (2d) 178.

5. In failing to hold that such letter, even if otherwise a claim for refund and not extinguished by such prior suit, was fatally defective because of the conditions which the taxpayer specified therein.

6. In failing to hold that the decision in the prior suit in any event foreclosed the maintenance of the present suit.

7. In failing to hold that the taxpayer's cause of action, if she had any, was barred by the statute of limitations.

8. In reversing the judgment of the District Court.

SUMMARY OF ARGUMENT

1. Every suit for refund must be founded upon a valid claim for refund. Here, the taxpayer's entire case rests upon the March 23, 1925, letter. Even if that letter be treated as an "informal" claim for refund which could be perfected after the expiration of the period of limitations, it was merged with and became extinguished by

the judgment in the earlier litigation. That judgment gave her everything that she sought in the letter.

2. In any event, the letter did not constitute a claim for refund, informal or otherwise, of any of the 1919 taxes originally paid by respondent. It was a letter protesting the assessment of an *additional* tax, with a statement of intention to file a claim for refund thereof; and she in fact did file such a claim for refund on June 4, 1925, which served as the basis for the prior litigation. The central ground of protest in the letter was that the original determination of the Commissioner upon the basis of which she had paid her 1919 taxes could not be reopened by his successor. And in stating that she would seek refund of the additional tax upon that ground, she announced vaguely that she would seek an even more favorable determination than that originally made by the Commissioner if it should be held that the determination could be reopened.

Thus, although respondent did make a timely claim for refund of the additional tax on June 4, 1925, she never filed any such claim for the original taxes which she seeks to recover herein. She did file a document in 1928 which purported to be an amendment of a timely claim, i. e., the March 23, 1925 letter, but that "amendment" was untimely as an original claim and can operate to impart life to the letter only if the letter can be regarded as a claim itself.

That the letter may not be considered a claim seems clear. It contained at most a warning that the taxpayer might file a claim for refund of the additional tax (which she did) together with an alternative suggestion as to what she would contend if her main contention as to the finality of the original determination were rejected. The letter was not a claim for refund of the additional tax, as shown by respondent's own conduct in filing a suitable claim shortly thereafter for the additional tax, and, *a fortiori*, cannot be regarded as a claim for refund of any of the original tax. Although this Court has gone far in permitting untimely amendments of defective claims, it has always insisted that the earlier document must in substance constitute a claim for refund.

The letter was fatally defective as a claim for refund for the further reason that it was conditional. A taxpayer may not keep liability open indefinitely by announcing that refund will be sought if and when any specified contingencies occur. Here, the taxpayer declared that she would seek refund of part of the original tax if it should be held that the original determination of the Commissioner could be reopened.

3. The maintenance of this suit is foreclosed by the prior litigation since tax liability for any one tax year constitutes but a single cause of action which cannot be split. Congress in establishing a comprehensive system of judicial review of in-

come tax matters (in the District Court, the Court of Claims, and the Board of Tax Appeals), could not have intended the remedies to be cumulative rather than alternative, and could not have intended liability for a single tax year to be the subject matter of litigation in more than one forum or of successive litigation in the same forum.

Finally, the cognate principle of *res judicata* forbids the maintenance of this suit.

ARGUMENT

Introductory.—Every suit for refund must be founded upon a valid and timely claim for refund.[1] The 1919 taxes which respondent seeks to recover in this suit were paid in 1920, and the last date within which she could have filed a timely claim was April 14, 1925.[2] She had not filed any such claim before that time, but on September 24, 1928, she filed what purported to be an "amend-

[1] *United States* v. *Felt & Tarrant Co.*, 283 U. S. 269; *Rock Island &c. R. R.* v. *United States*, 254 U. S. 141.

[2] The taxes which respondent seeks to recover were paid during the year 1920 (R. 13), and the time within which she could have filed claim for refund was, under Section 284 (b) and (h) of the Revenue Act of 1926 (see Appendix, *infra*, p. 47), four years from the date of payment, or at most, five years from the date the return was due. The return for the year 1919 was originally due on March 15, 1920, and the time was in this case extended by the Collector for 30 days from March 15, 1920 (R. 13), or to April 14, 1920. Accordingly, April 14, 1925, was the last possible day on which respondent could have filed claim for refund of these taxes.

ment" of a claim filed March 24, 1925. The latter was simply an informal unsworn letter of protest with respect to a deficiency assessment, not here involved, and she does not contend that the letter standing alone is a sufficient claim for refund. Her sole contention is that the letter constituted a defective claim for refund which could be and was perfected by the so-called 1928 amendment.

It is our position that this suit is not maintainable for any one of three independent reasons: (1) That even if the 1925 letter were to be considered a claim for refund, it became merged with and was extinguished by the judgment entered pursuant to the decision in 26 F. (2d) 178, with the consequence that this suit is not supported by any claim for refund; (2) that in any event the letter was not a claim for refund at all as shown both by its contents and extrinsic circumstances, that it was not treated as such by petitioner herself, and that it could not be "perfected" by an untimely "amendment"; and (3) that even if the letter were an independent valid claim for refund, not otherwise extinguished by the 1928 judgment, this suit is foreclosed by the earlier litigation, not only because under the statutory scheme for litigating federal taxes Congress did not intend to permit a taxpayer to litigate tax liability piecemeal for any one year, but also because of the doctrine of *res judicata*.

I

EVEN IF THE 1925 LETTER BE CONSIDERED A CLAIM FOR REFUND, IT WAS MERGED WITH AND BECAME EXTINGUISHED BY THE JUDGMENT IN THE PRIOR LITIGATION

1. In this suit respondent seeks to recover 1919 taxes paid by her in 1920. During 1919 she had sold 525 shares of Ford Motor Company stock at $12,500 a share. She had acquired those shares prior to 1913, so that her taxable gain was to be measured from the March 1, 1913, value of the stock. She reported the gain upon the basis of a March 1, 1913, value of $9,489.34 per share, a valuation that was fixed and accepted by the then Commissioner of Internal Revenue.

Thereafter, on or about March 13, 1925, the Commissioner of Internal Revenue determined that the March 1, 1913, value of the Ford stock was considerably less than the amount reported by the taxpayer and previously agreed to by the former Commissioner, and made a jeopardy assessment against her in the amount of $2,627,309.05. She thereupon paid that assessment accompanied by a letter of protest addressed to Fred L. Woodworth, the collector of internal revenue in her district. And since her entire position in this case turns upon that letter, it is important to examine it carefully.

The letter opens with a general paragraph protesting against the deficiency assessment and

states that payment is made under duress (R. 14). The second paragraph states that she protests against the deficiency assessment "for the following particular reasons" (R. 14), and there follow ten numbered paragraphs. In essence the first eight of those numbered paragraphs state that the March 1, 1913, value of the Ford stock previously approved by the former Commissioner of Internal Revenue was final and could not be redetermined. Paragraphs numbered 9 and 10 announce that although the taxpayer insists that the valuation previously accepted "should stand" (R. 17), she will nevertheless contend for an even higher valuation if the issue is one that can be reopened. The letter then concludes with an unnumbered paragraph in which the taxpayer declares that she "will make claim for the refund of the deficiency tax herewith paid and should such refund be denied she will bring legal proceedings to recover same" (R. 18).

In accordance with that declared intention she thereupon did file a claim for refund on June 4, 1925, and brought suit thereon. The court agreed with her contention in that case that the determination of the former Commissioner fixing $9,489.34 as the March 1, 1913, value of the stock could not be reopened, and awarded her a judgment in the amount of the deficiency ($2,627,-

309.05) plus interest. *Woodworth* v. *Kales*, 26 F. (2d) 178 (C. C. A. 6th).[3]

In the instant suit, she seeks an additional refund of $195,710.44 plus interest based upon a March 1, 1913, value of $10,000 per share of the identical shares of Ford stock involved in the prior suit.

2. In Point II, *infra*, p. 18, we will urge that the March 23, 1925, letter upon which this suit is bottomed cannot be considered as a claim for refund at all, and that this suit is therefore fatally defective. At this point, we contend that even if that letter be considered a claim for refund which could otherwise be "perfected" by a subsequent amendment, it became merged with the judgment in the prior litigation and is therefore not available to support the present suit.

As noted above, the March 23, 1925, letter was a letter addressed to the Collector of Internal Revenue, accompanying the payment of the $2,627,309.05 deficiency assessment and it protested against that assessment. The central ground of protest was that the Commissioner had no power to reopen the valuation of the Ford stock since the former Commissioner's acceptance of a valuation of $9,489.34 per share was final.

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[3] It seems clear that her victory in that case was wholly unwarranted, for it has since been repeatedly held that the determination of the Commissioner of Internal Revenue can be reopened at any time. *Burnet* v. *Porter*, 283 U. S. 230; *Commissioner* v. *Newport Industries*, 121 F. (2d) 655, 657 (C. C. A. 7th).

And it is clear from the context of the letter that the taxpayer was concerned only with the deficiency assessment, for she introduced her 10 numbered paragraphs with the statement that she protested against that assessment "for the following particular reasons." Those "following particular reasons" disclosed in substance but one basic contention, namely, that the Commissioner had no authority to reconsider a determination made by his predecessor in office. Paragraphs numbered 9 and 10 merely supplement the main contention by asserting that if the previous determination can be reopened, the taxpayer will seek to establish an even higher valuation. The concluding unnumbered paragraph then states that she will file claim for refund "of the deficiency tax herewith paid" (R. 18).

After having filed a formal claim for refund less than two months later she then brought suit and actually recovered the entire deficiency plus interest, on the sole ground that the Commissioner could not reopen the determination of his predecessor. 26 F. (2d) 178.

The judgment in that prior suit gave the taxpayer everything that she demanded in her letter of March 23, 1925. At most that letter was preliminary or introductory to the June 4, 1925, claim, and her sweeping victory in that litigation was fully responsive to the letter and the June 4, 1925, claim. Therefore, even if the letter might otherwise be regarded as an "informal" claim, it

ceased to have any vitality as such after that litigation and consequently cannot afford any foundation for the present suit.

Thus, the Commissioner properly advised the taxpayer that (Exhibit I, R. 24), in view of the judgment entered in her favor in the amount of $2,627,309.05, with interest, representing an overpayment of her tax for the year 1919, the Bureau was precluded from giving any further consideration to the matter of her income tax liability for the year 1919, and, later, that (Exhibit L, R. 25–26) her claim was merged with the judgment and the judgment removed the matter from the realm of administrative action, except to make the refund directed thereby.

Since the letter of March 23, 1925—even if it were regarded as constituting an "informal" claim for refund—was merged with the judgment in the prior suit, it follows that there remained nothing to which the purported amendment filed in 1928 could attach as an amendment. The 1928 claim was, as already seen, ineffective as an original claim. Therefore, at the time the present suit was brought, there was not in existence a valid claim which could support it.

II

IN ANY EVENT, THE MARCH 23, 1925, LETTER WAS NOT A CLAIM FOR REFUND OF THE TAXES HERE INVOLVED, AND CANNOT SUPPORT THIS SUIT

In Point I we have contended that the judgment entered in the prior litigation was fully re-

sponsive to the March 23, 1925, letter, so that if it is to be treated as a claim for refund it became extinguished by that judgment. However, it seems quite plain, and we so contend here, that the letter was not intended to be nor can it be regarded as a claim for refund of the taxes here involved.

1. Under the regulations then in force, a claim for refund was required to be filed on "Form 843" and to set forth under oath all of the facts relied upon. Article 1306 of Treasury Regulations 65, infra, p. 48.[4] The letter of March 23, 1925, obviously does not fulfill either of those requirements, and is therefore fatally defective, standing by itself, as a foundation for this suit.[5] The taxpayer has not contended otherwise, and rests her sole case upon the untimely 1928 amendment as retroactively imparting life to her so-called March 23, 1925, claim.

It is true that this Court has gone far in permitting taxpayers to "amend" or "perfect"

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[4] This same general requirement of the regulations continued in effect until May 1, 1929, when the requirements were somewhat expanded. T. D. 4265, VIII-1, Cum. Bull. 110, *infra*, p. 49.

[5] While the failure to use the Treasury form may not of itself be significant (see T. D. 4265, VIII-1, Cum. Bull. 110; *Lasher* v. *United States*, 65 C. Cls. 295), the failure to comply with the requirement of the oath is far from unimportant. Thus, in the cognate inquiry as to whether an unsworn return, otherwise complete and in good form, complies with the statutory requirement, this Court has held such to be no return at all for the purpose of starting the running of the period of limitations. *Lucas* v. *Pilliod Lumber Co.*, 281 U. S. 245.

earlier timely claims by amendments filed after the expiration of the limitations period. But in every such case it was essential that the original document constitute *in substance* a claim for refund of the taxes sought to be recovered. Thus a timely claim, plainly intended as such, may be amended thereafter if it is too general or defective in form. *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62. But even that liberal rule has been restricted so as to forbid an untimely amendment introducing new grounds that differ from the specific grounds set forth in the timely claim. *United States* v. *Andrews*, 302 U. S. 517; *United States* v. *Gaylatt Oil Co.*, 302 U. S. 528. And the rule permitting an untimely amendment has always rested, even in cases where most liberally applied, upon the assumption that, apart from defects as to form, there had been timely filed what in substance amounted to a claim for refund.[1]

The March 23, 1925, letter in this case was not a claim for refund either in form or in substance, and therefore could not be converted into a claim for refund by an untimely "amendment."

2. The letter was not in substance a claim for

[1] This result is a necessary consequence of the statutory requirement that there be a claim for refund, a requirement that can not be waived, as distinguished from mere requirements as to form which can be waived. Cf. *United States* v. *Gaylatt Oil Co.*, 302 U. S. at 533.

Similarly in the case of returns, the statutory requirement is satisfied only by the filing of what in substance constitutes a return. *Blumsheim Bros. Co.* v. *United States*, 280 U. S. 455; *Zellerbach Co.* v. *Helvering*, 293 U. S. 172, 180.

refund of the taxes in controversy. The burning question discussed in the letter was the validity of the deficiency assessment, and the letter contained a vigorous protest against that assessment. But even as to the deficiency assessment the letter did not constitute in substance a claim for refund, for the taxpayer announced that she would thereafter file such claim and in fact did file such claim on June 4, 1925.

The letter protested that the deficiency assessment was invalid because of the finality of the earlier determination. The taxpayer's primary objective was to freeze the earlier determination, an objective that she attained in the litigation which terminated some 13 years ago. Her vague alternative suggestion as to what she would seek if she failed to achieve that primary objective can hardly be viewed as a claim for refund. Certainly, if the letter were not a claim for refund of the deficiency assessment itself, it could scarcely qualify as a claim for refund of the taxes herein. As to the latter, she simply warned the Commissioner that "if it should be held" by any "body having jurisdiction thereof to which this controversy should be submitted," that the earlier determination as to value could be reopened, "then" she "will" claim an even higher valuation and "will claim the right to a refund" of any excess in the tax she had paid originally (R. 17–18). Clearly, that amounted to no more than a warning that she might file a claim in the future.

The error of the court below was in treating that warning as a "clear notice to the Commissioner that * * * she *was* claiming a refund" of part of the original tax. [R. 47–48, italics supplied.] The statements in the letter with reference to the original tax were no more significant or operative as a claim than those made in regard to the additional tax. At most, both merely announced an intention to file a claim. The taxpayer did thereafter file a timely claim for the refund of the additional tax, but she failed to file any claim for refund of the original tax until 1928, when it was obviously too late. This failure to file a timely claim as to the original tax is in effect set to nought by the court below in concluding that the present action is maintainable. The court erroneously viewed the situation as falling under the rule that just as in a pleading, a taxpayer may, in a claim for refund, assert in the alternative two or more inconsistent grounds for refund (R. 48). Here, the taxpayer, at most, asserted in her letter of protest two alternative but nevertheless interdependent grounds upon which she would or might file claims for refund, one as to the additional tax and the other as to the original tax. But, while she later did file her claim for refund as to the one, she failed to file any claim as to the other until it was too late. The lack of such timely claim to "follow up" her warning as to the original tax is fatal to her suit for the recovery thereof.

A protest with a notice that a refund will be sought or a statement of intention to file a claim

has always been considered not to constitute a "claim" which would satisfy the statutory requirement. See *Art Metal Const. Co.* v. *United States*, 47 F. (2d) 558 (C. C. A. 2d), certiorari denied, 283 U. S. 863, where the Circuit Court of Appeals said (pp. 559, 560):

> The supposed claim was no claim at all; it was a mere caveat, an attempt to reserve the taxpayer's right at some later time to file a claim * * *.
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> * * * To allow him [taxpayer] to substitute, not a claim, but a warning that he may in the future make a claim—which is all on any theory that the supposed claim was—substantially dispenses with the statute altogether. * * *

See also *Ordway* v. *United States*, 37 F. (2d) 19 (C. C. A. 2d), *Dysart* v. *United States*, 95 F. (2d) 652, 653–654 (C. C. A. 8th), certiorari denied, 305 U. S. 608; *Semmes Motor Co.* v. *United States*, 67 C. Cls. 631, 635–636; *Mutual Trust Life Ins. Co.* v. *United States*, 45 F. (2d) 288, 290 (C. Cls.); *Heberlein Patent Corp.* v. *United States* (S. D. N. Y.), decided March 9, 1938, not officially reported but found in 1938 Prentice-Hall, Vol. 1, par. 5287, affirmed on another point, 105 F. (2d) 965 (C. C. A. 2d); *Waters* v. *United States*, 12 F. Supp. 658 (W. D. Mich.), affirmed per curiam, May 15, 1935, by the court below.

To be sharply distinguished from the instant case is *Bonwit Teller & Co.* v. *United States*, 283

U. S. 258, where recovery was allowed on the theory of an "account stated," i. e., based upon the contractual liability of the United States to make refund of the taxes in the very exceptional circumstances there presented. See *United States* v. *A. S. Kreider Co.*, 313 U. S. 443, 448. Moreover, the *Bonwit Teller* case did not involve a document which on its face disclosed that the taxpayer did not regard it as a demand for refund. And in any event there were also involved certain additional statutory provisions in that case with respect to waivers intended to grant relief to taxpayers which the Court thought should be very liberally construed (283 U. S. at 263). No such provisions are present here.

The decision of the court below, permitting the taxpayer to maintain this action without a genuine timely claim to support it, constitutes a departure from established principles. See *United States* v. *Felt & Tarrant Co.*, 283 U. S. 269; *United States* v. *Henry Prentiss & Co.*, 288 U. S. 73; *United Shoe Machinery Corp.* v. *White*, 89 F. (2d) 363, 368 (C. C. A. 1st), certiorari denied, 302 U. S. 768; *United States* v. *Mellon*, 39 F. (2d) 505, 507 (App. D. C.); *McLaughlin* v. *Dean Witter & Co.*, 69 F. (2d) 259, 262 (C. C. A. 9th); *Livermore* v. *Miller*, 94 F. (2d) 111 (C. C. A. 5th), certiorari denied, 304 U. S. 582; *Anderson* v. *United States*, 6 F. Supp. 851 (C. Cls.); *Pine Hill Crystal Spring Water Co.* v. *United States*, 58 F. (2d) 506 (C. Cls.); *International Arms and Fuze Co.* v. *United*

States, 37 F. (2d) 771 (C. Cls.); *Philipsborn* v. *United States*, 53 F. (2d) 133 (C. Cls.), certiorari denied, 285 U. S. 548; *Northwestern Natl. Life Ins. Co.* v. *Willcuts* (Minn.), decided April 11, 1931, not officially reported but found in 1931 C. C. H., Vol. 3, par. 9536; *Pratt & Letchworth Co.* v. *United States*, 1 F. Supp. 745 (W. D. N. Y.); *Peterson* v. *United States* (E. D. Okla.), decided April 10, 1939, not officially reported but found in 1939 Prentice-Hall, Vol. 1, par. 5.418; see also *Balto. & Ohio R. R.* v. *United States*, 260 U. S. 565, and *Savings Institution* v. *Blair*, 116 U. S. 200. Thus, in holding that objections to the assessment of a tax are essentially different from a claim to have it refunded, the Circuit Court of Appeals for the First Circuit stated, in *United Shoe Machinery Corp.* v. *White*, *supra* (p. 368): "The statute clearly contemplates that some *demand* for refund shall be made" [italics supplied]. In *United States* v. *Mellon*, *supra*, the court held that the filing of a so-called "claim," even though on Form 843, did not satisfy the statutory requirement if what was filed was not in substance a claim demanding a refund. In *McLaughlin* v. *Dean Witter & Co.*, *supra*, the Ninth Circuit held that even a closing agreement between a taxpayer and the Commissioner, and a letter by the taxpayer to the Commissioner, were (p. 262) "insufficient to constitute even an informal claim for refund." In *Peterson* v. *United States*, *supra*, the court held that a letter, under oath, protesting against a de-

ficiency, did not constitute an informal claim susceptible of later amendment by an untimely formal claim, because it failed to assert that an overpayment had been made in any aggregate amount and failed to contain any demand for the return thereof. All of the other decisions of lower courts just cited recognize the same principles in a variety of circumstances.

3. Even if the letter were otherwise a proper claim for refund, it is fatally defective because it was conditional.

The court below took the view that the letter "was in the nature of a counterclaim" which "did not mature until the March 1, 1913, value of the stock as previously determined by the Commissioner was changed by his office, the Board of Tax Appeals or some court of competent jurisdiction" (R. 48). Thus, the court treated the letter as a contingent claim, which completely suspended the statute of limitations until some future date when one of the contingencies specified by the taxpayer might occur. And the court apparently treated as such a contingency a subsequent decision of the Board of Tax Appeals in a proceeding to which the taxpayer was a stranger (R. 45, 48).[7] Therefore, the decision of the court below must rest on no more than an assumption that such an unrelated decision gave life to the taxpayer's claim.

If the principle announced by the court below were generally followed, taxpayers would be per-

[7] *Couzens* v. *Commissioner*, 11 B. T. A. 1040.

mitted to suspend the statute of limitations operating against refund claims by mere assertions that they will file claims in the future if and when various contingences occur.[5] Yet it seems clear that the Commissioner should not be forced to consider at his peril every informal assertion to him by a taxpayer as constituting a claim for refund and should not, for obvious reasons, be forced to treat as a claim every declaration made to him of an intention to file a claim for refund upon the happening of any one of a large number of specified contingencies.

Moreover, even if it were possible to recognize a contingent claim, the taxpayer is not aided here. The contingency which she stated was (R. 17) "if it should be held" by the Bureau, by the Board, or by any "other body having jurisdiction thereof to which this controversy should be submitted" that the former valuation could be set aside and reopened and "the contentions of this taxpayer as heretofore set forth be overruled," then the taxpayer would claim an even higher valuation, etc. But the court to which her controversy was submitted, the court below, held that the former valuation could not be set aside and reopened. Therefore, the contingency never arose.

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[5] Moreover, if the decision below is correct, there would have been no necessity for the enactment of Section 608 (b) (2) of the Revenue Act of 1928, 45 Stat. 791, *infra*, authorizing an agreement in writing between the taxpayer and the Commissioner to suspend the statute of limitations until final decision in one or more cases pending either in the courts or in the Board of Tax Appeals.

III

EVEN IF THERE WERE A VALID AND TIMELY CLAIM FOR REFUND, NOT OTHERWISE EXTINGUISHED BY THE PRIOR JUDGMENT, THIS SUIT IS NEVERTHELESS NOT MAINTAINABLE BY REASON OF THAT PRIOR JUDGMENT

In Points I and II we contended that the judgment in the earlier litigation was fully responsive to the letter of March 23, 1925, so that it became extinguished by the judgment, and that in any event that letter could not be regarded as a claim for refund at all. We now contend that even if the letter were a valid claim for refund which had not been fully satisfied by the former judgment, then the earlier litigation nevertheless prevents the maintenance of this suit.

1. Both this suit and the prior litigation involved the respondent's income-tax liability for the year 1919. But it has been firmly established that income-tax liability for any one year constitutes a single cause of action. Thus, in a suit for refund, even against the Collector, a taxpayer is not entitled to recover on the item of overpayment to the extent that it can be shown that there are any other items for the same year, however unrelated and though otherwise barred by the statute of limitations, with respect to which he has underpaid his tax. *Lewis* v. *Reynolds*, 284 U. S. 281. And it has been held in other circumstances that the claim that the income tax for a single year has been overpaid constitutes but one cause of action. *International Curtis Marine Turbine Co.* v. *United States*, 56 F. (2d) 708 (C. Cls.);

American Woolen Co. v. *United States*, 18 F. Supp. 783 (C. Cls.), affirmed on rehearings, 21 F. Supp. 125, 1021, certiorari denied, 304 U. S. 581. Cf. *Guettel* v. *United States*, 95 F. (2d) 229 (C. C. A. 8), certiorari denied, 305 U. S. 603.

The decision below is thus in conflict with the settled principle that a single cause of action may not be split. In *Stark* v. *Starr*, 94 U. S. 477, this Court pointed out that a litigant (p. 485):

> is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible. * * *

See also *Grubb* v. *Public Utilities Comm.*, 281 U. S. 470; *United States* v. *California and Ore. Land Co.*, 192 U. S. 355; *Werlein* v. *New Orleans*, 177 U. S. 390; *Nolan* v. *City of Owensboro*, 75 F. (2d) 375 (C. C. A. 6); *Fields* v. *Phila. Rapid Transit Co.*, 273 Pa. 282; *See* v. *See*, 294 Mo. 495. In accord with that principle it has been often held that a judgment in a former suit for refund is a bar to a subsequent suit for refund of taxes for the same year notwithstanding the fact that the ground for recovery urged in the second suit had not been presented in the first. *Chicago Junction Rys. etc.* v. *United States*, 10 F. Supp. 156 (C. Cls.); *Bowe-Burke Mining Co.* v. *Willcuts*, 45 F. (2d) 394 (Minn.); *Western Maryland Ry. Co.* v. *United States*, 23 F. Supp. 554 (Md.). See also

Bertelsen v. *White*, 58 F. (2d) 792 (Mass.), affirmed on other grounds, 65 F. (2d) 719 (C. C. A. 1st), and *American Woolen Co.* v. *United States, supra.*

Thus in *Guettel* v. *United States, supra*, an estate tax case, the court said that taxpayers (95 F. (2d) at 231):

> were not at liberty to split up their claim for the recovery of their overpayment of the estate tax, and to prosecute it piecemeal or to present in their first suit only a portion of the grounds upon which they based their claim that the tax had been overpaid, and leave another ground or other grounds to be presented in a subsequent action.

Similarly, in *Western Maryland Ry. Co.* v. *United States*, 23 F. Supp. 554 (Md.), the court went even further, holding that a former suit against the collector for refund of taxes barred a second suit against the United States for interest. The court said (p. 556):

> a tax and resulting interest are to be treated as constituting a single liability and thus as one cause of action, and not merely an aggregation of separate items of indebtedness. * * *
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> It is fundamental that a single cause of action may not be split up and brought piece-meal, because, otherwise, litigation might be rendered interminable. See *Stark* v. *Starr*, 94 U. S. 477, 24 L. Ed. 276; *Baltimore Steamship Company* v. *Phillips*,

274 U. S. 316, 47 S. Ct. 600, 71 L. Ed. 1069; Freeman on Judgments, 5th Ed. § 596. This doctrine is equally applicable to tax cases. *Gaetlet* v. *United States*, 8 Cir., 95 F. 2d 229; *International Curtis Marine Turbine Co.* v. *United States*, Ct. Cl., 56 F. 2d 708. * * *

The rule against splitting a cause of action is particularly applicable in the case of Federal income taxes. In providing the machinery for litigating tax matters, Congress has established a comprehensive system of review. It has offered the dissatisfied taxpayer three alternative courses of action: (a) he may seek review of the Commissioner's determination in the Board of Tax Appeals, and thereafter in the appellate courts; (b) he may pay the contested tax and sue the United States for refund, either in the Court of Claims or in the District Court (subject to certain jurisdictional restrictions in the latter); (c) he may sue the collector for refund in the District Court.[9] The very complexity of this machinery

[9] It is perhaps true, as noted by the court below (R. 47), that in her suit against Collector Woodworth, respondent could not have asked for recovery of taxes paid to a predecessor collector. But she certainly could have brought a single suit against the United States for the full amount of any overpayment for the year 1919. That her *remedy* against Collector Woodworth permitted her to recover only on part of her cause of action does not justify splitting the cause of action. Her remedy against the United States was complete, and she should not be heard to complain that she elected to pursue the less desirable course. Cf. *Fields* v. *Phila. Rapid Transit Co.*, 273 Pa. 282, 286: "It matters not that the first suit was brought, as here, in a court of limited jurisdiction."

coupled with the well-established rule against splitting a cause of action makes it highly improbable that Congress could have intended to permit a taxpayer to contest liability for the same tax year in more than one forum or to bring successive suits in the same forum.

2. But wholly apart from the foregoing discussion that a single cause of action may not be split and that Congress, by establishing comprehensive judicial machinery for the review of tax matters, indicated that it did not intend tax liability for one year to be litigated in more than one suit, the maintenance of this suit is forbidden by the cognate doctrine of *res judicata*. The earlier litigation dealt with the basis of the Ford stock, and the refund sought herein turns upon the basis for the identical shares.

The mere fact that the defendant in the former suit was the Collector of Internal Revenue whereas the United States is the defendant herein should make no difference. As pointed out by this Court in *Chicago, R. I. & P. Ry.* v. *Schendel*, 270 U. S. 611, 620, "Identity of parties is not a mere matter of form, but of substance." See also *Calhoun's Lessee* v. *Dunning*, 4 Dall. 120, 121; *Cromwell* v. *County of Sac*, 94 U. S. 351, 360. In *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 401–404, it was held that a coal company's prior litigation with the National Bituminous Coal Commission was *res judicata* in a subsequent action against a collector of internal revenue. And although it has been held that a collector of

internal revenue may be bound by a prior suit against the Commissioner of Internal Revenue on the ground that the Commissioner is the collector's superior officer.[10] The *Sunshine Coal Co.* case rests upon no such narrow basis. The collector and the Coal Commission were completely independent of each other. The important consideration there was that the United States was the real party in interest in both suits, and in determining whether the collector is to be concluded by the earlier litigation the Court stated that "The crucial point is whether or not in the earlier litigation the representative of the United States had authority to represent its interests in a final adjudication of the issue in controversy" (p. 403).[11] Cf. *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273, 284, 285.

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[10] *Tait* v. *Western Maryland Ry. Co.*, 289 U. S. 620. The question involved in that case and its converse, *Bankers Pocahontas Coal Co.* v. *Burnet*, 287 U. S. 308, does not, however, present the true issue of *res judicata* that is involved herein. In those cases the question was the extent to which a suit relating to tax liability for earlier years was conclusive on like issues raised in a suit for later tax years. The problem in those cases really involved an extension of the principle of *res judicata*, an extension that is not universally applied. Cf. *Blair* v. *Commissioner*, 300 U. S. 5. Moreover, those cases have been sharply criticized. See Griswold, *Res Judicata in Federal Tax Cases*, 46 Yale L. J. 1320, 1340–1347; Paul, *Selected Studies in Federal Taxation* (Second Series), pp. 104, 124–126.

[11] The Court then briefly distinguished several earlier cases as turning upon the "personal" nature of a suit against a collector. However, the *Sunshine Coal* case itself involved no such distinction, and, as we will attempt to show, *infra*, pp. 34–42, whatever validity there may have been to such a distinction in former times is no longer present.

Thus, we are brought to the pivotal question whether the former suit in this case against the collector was in substance a suit against the Government. In considering this question it will be helpful to examine briefly the historical development of suits against collectors and their present status.

It became established at a rather early date, both in this country and in England, that an action in *indebitatus assumpsit* would lie at common law against a collector in certain circumstances. See *Elliott* v. *Swartwout*, 10 Pet. 137, in which a number of the English cases are collected. It was a fundamental rule in the law of agency that the agent of a known principal could not be held liable for funds which he had transmitted to his principal.[12] But where payment was made to the agent under protest and the agent was given notice not to transmit the funds to his principal, the law implied a promise on the part of the agent to make repayment to the third party. Accordingly, it was held that one who had voluntarily made payment to the collector could not recover where the collector had paid the money over to the Treasury, but that where the collector had been notified not to transmit the funds to the

[12] *Sadler* v. *Evans*, 4 *Burr.* 1984; *Buller* v. *Harrison*, 2 Cowp. 565; *East India Co.* v. *Tritton*, 3 B. & C. 280; *White* v. *Bartlett*, 9 Bing. 378; *Horsfall* v. *Handley*, 8 Taunt. 136, 138; *Hooper* v. *Robinson*, 98 U. S. 528, 540–541; *Baldwin* v. *Black*, 119 U. S. 643, 647.

Treasury, he did so at his peril, giving rise to an implied promise to repay the money illegally exacted. *Elliott* v. *Swartwout, supra.*[13]

As a consequence of that rule, however, a collector might refuse to pay the protested taxes into the Treasury in order to protect himself. The inconvenience thus caused to the Treasury together with the fact that the funds might be jeopardized meanwhile through their use by the collector in personal speculative ventures (see *Barney* v. *Watson*, 92 U. S. 449, 452; *Murray's Lessee* v. *Hoboken Land Co.*, 18 How. 272, 275), led to the enactment of statutory provisions in 1839 requiring the collector to pay all taxes into the Treasury, irrespective of protest, and providing for the administrative refund of illegally collected taxes by the Secretary of the Treasury (c. 82, 5 Stat. 339).

That legislation thus removed the basis for suits against the collector. Since the collector was now under a duty to pay over the money collected, it was therefore impossible to spell out any implied promise on his part to support an action of assumpsit. This Court so held in *Cary* v. *Curtis*, 3 How. 236, and the reasons which compelled that result were restated with even greater clarity in

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[13] See also *Greenway* v. *Hurd*, 4 Term R. 553; *Campbell* v. *Hall*, 1 Cowp. 204, 205; *Whitbread* v. *Brookshank*, 1 Cowp. 66, 69.

Curtis's Administratrix v. *Fiedler*, 2 Black 461, 478:

> *Indebitatus assumpsit* is founded upon what the law terms an implied promise on the part of the defendant to pay what in good conscience he is bound to pay to the plaintiff. Where the case shows that it is the duty of the defendant to pay, the law imputes to him a promise to fulfill that obligation. Such a promise, says the Court, is always charged in the declaration, and must be so charged in order to maintain the action. But the law never implies a promise to pay unless some duty creates such an obligation, and more especially it never implies a promise to do an act contrary to duty or contrary to law. Collectors under the act referred to were required to pay all moneys received for unascertained duties or for duties paid under protest into the Treasury of the United States, and consequently this Court held that in a case arising under that law, where that duty had been performed by the collector, the law would not imply a promise on his part to pay the same back to the importer, because he was under no obligation to pay the money twice, and to have paid the same back to the importer in the first place would have been contrary to his official duty as prescribed by an Act of Congress. * * *

See also *Arnson* v. *Murphy*, 109 U. S. 238, 240.

Since that result left the aggrieved taxpayer without any judicial remedy, Congress shortly

thereafter restored the right to maintain suit against the collector, notwithstanding his obligation to pay all taxes into the Treasury. Act of February 26, 1845, 5 Stat. 727. But, beginning with that statute, the suit against the collector was converted into a statutory remedy, and the various statutory provisions, which have been enacted since that time with respect to such suits, have removed all significant resemblance to a common-law suit and have established it beyond question as a statutory remedy. The Court has often recognized that "the common-law right of action against a collector to recover duties illegally collected was taken away by act of Congress, and a statutory remedy given, which was exclusive" (*Schoenfeld* v. *Hendricks*, 152 U. S. 691, 693). See *Nichols* v. *United States*, 7 Wall. 122, 126–127; *Barney* v. *Watson*, 92 U. S. 449, 452; *Arnson* v. *Murphy*, 109 U. S. 238, 240, 243; *Auffmordt* v. *Hedden*, 137 U. S. 310, 329; *Philadelphia* v. *Collector*, 5 Wall. 720, 731–735; *Collector* v. *Hubbard*, 12 Wall. 1, 12–14; *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 382–383.

The present status of the suit against the collector was thus summarized by Mr. Justice Cardozo in the *Moore Ice Cream Co.* case (289 U. S. at 382–383):

> A suit against a Collector who has collected a tax in the fulfilment of a ministerial duty is today an anomalous relic of bygone modes of thought. He is not suable as a trespasser,

> nor is he to pay out of his own purse. He is made a defendant because the statute has said for many years that such a remedy shall exist, though he has been guilty of no wrong, and though another is to pay. * * * There may have been utility in such procedural devices in days when the Government was not suable as freely as now. * * * They have little utility today, at all events where the complaint against the officer shows upon its face that in the process of collecting he was acting in the line of duty, and that in the line of duty he has turned the money over. *In such circumstances his presence as a defendant is merely a remedial expedient for bringing the Government into court.* [Italics supplied.]

True, in certain circumstances the suit against the collector may retain the outward appearance of a "personal" suit and has at times been characterized as such.[14] But that appearance is purely formal and should not for a moment obscure the fact that the suit is in reality against the United States, that the Attorney General appears on behalf of the defendant (against whom execution will not issue) with full authority, in the language of the *Sunshine Coal Co.* case, "to represent its [United States] interests in a final adjudication of the issue in controversy," 310 U. S. at 403.

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[14] See, e. g., *Patton* v. *Brady*, 184 U. S. 608, 612-615; *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1; *Lowe Bros. Co.* v. *United States*, 304 U. S. 302.

That there may be some procedural differences between a suit against the collector and one against the United States is of no significance in determining the true nature of the suit against the collector. Thus, although a suit against the United States in the Court of Claims may have different incidents from a suit against the United States in the District Court, it is nevertheless plain that they are essentially the same. Similarly, the mere fact that the suit against the collector may retain certain of its original formal or procedural aspects is unimportant if it is in essence a suit against the Government. And that it is in essence a suit against the Government has been established beyond serious question in the *Moore Ice Cream Co.* case.

Thus, to the extent that *Sage* v. *United States*, 250 U. S. 33, seems to reach a different result, it is plainly out of line with this Court's more thorough and more recent consideration of the nature of the suit against the collector in the *Moore Ice Cream Co.* case. In any event, however, the *Sage* case is distinguishable in several important respects.

At the very outset it should be noted that the *Sage* case arose under materially different statutory provisions. The death taxes there involved had been collected under an 1898 statute, and a 1902 statute had thereafter directed refund of certain taxes theretofore collected. The claimant

brought suit and recovered judgment against the collector in the amount then thought to be refundable. However, it appeared that judgment should have been in a greater amount, and Congress in 1912 enacted further legislation spelling out the extent of refund in such circumstances. The claimant thereafter brought suit against the United States for the difference, relying primarily upon the newly enacted 1912 legislation. As the Court in the *Sage* case noted, 250 U. S. at 39, "The Act of 1912, like that of 1902, created rights where they had not existed before * * *." Accordingly, the decision in the *Sage* case is supportable upon the ground that the rights which were the subject matter of the second suit had not been the subject of prior litigation. Indeed, the *Sage* case has been regarded at least several times as resting upon the particular legislation there involved.[15] See *Second Nat. Bank of Saginaw* v. *Woodworth*, 54 F. (2d) 672, 673 (E. D. Mich.),

[15] It should be carefully noted that the *Sage* case has no bearing upon our argument, *supra*, p. 31, that Congress did not intend to permit multiple suits, as disclosed by the comprehensive machinery that it has established for litigating tax matters. That issue was never raised in the *Sage* case. Cf. *Webster* v. *Fall*, 266 U. S. 507, 511; *United States* v. *Mitchell*, 271 U. S. 9, 14; *Williams* v. *United States*, 289 U. S. 553, 570; *KVOS* v. *Associated Press*, 299 U. S. 269, 279. Indeed, the issue could not have been fully presented at that time for the Board of Tax Appeals had not yet come into existence.

affirmed, 66 F. (2d) 170 (C. C. A. 6th); *Cudahy Packing Co.* v. *Harrison*, 18 F. Supp. 250, 254 (N. D. Ill.), appeal dismissed, 102 F. (2d) 981 (C. C. A. 7). See also Griswold, *Res Judicata in Federal Tax Cases*, 46 Yale L. J. 1320, 1341–1342.

The *Sage* case is further distinguishable upon the ground that whatever vital distinctions may then have existed between suits against the collector and suits against the United States have disappeared since that time. Thus, the Court stated (250 U. S. at 37), "The suit is personal and its incidents, such as the nature of the defenses open and the allowance of interest, are different." At that time interest was allowable on judgments against the collector (cf. *Erskine* v. *Van Arsdale*, 15 Wall. 75), whereas Congress had made no provision for interest in suits against the United States. That difference obviously made it much more attractive to sue the collector than the United States, and probably is in large part responsible for the much larger proportion of suits against collectors at that time. But that discrepancy has since been eliminated by Section 177 of the Judicial Code, as amended by Section 1324 (b) of the Revenue Act of 1921 (42 Stat. 227), Section 1117 of the Revenue Act of 1926 (44 Stat. 9), Section 615 of the Revenue Act of 1928 (45 Stat. 791), and as finally amended by Section 808 of the Revenue Act of 1936 (49 Stat. 1648), so that the provisions

for interest are identical irrespective of whether the defendant is the collector or the United States. As to what the Court in the *Sage* case meant by the difference in the "nature of the defenses open", it is difficult to determine. Although there may be certain formal differences between the two types of suits (see footnote 14, *supra*), there are we believe, no differences of any substance.

Finally, the *Sage* case is further distinguishable in that it was then thought that a judgment against the collector would not necessarily be paid by the United States, depending upon whether he were granted a certificate of probable cause. 250 U. S. at 37. But this Court has since indicated that the collector would be entitled to a certificate of probable cause as of right in such circumstances.[16] *Moore Ice Cream Co.* v. *United States*, 289 U. S. at 381–382.

Accordingly the suit against the collector is in all essential respects a suit against the United States, and judgment in such suit should be *res judicata* in the later suit against the United States just as though the former suit itself had been against the United States.

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[16] See dissenting opinion of Judge Whitaker in *Nunnally Investment Co.* v. *United States*, 36 F. Supp. 332 (C. Cls.), pending upon petition for rehearing on denial of certiorari, No. 990, 1940 Term. See also *Hammond-Knowlton* v. *United States*, 121 F. (2d) 192, 197–198 (C. C. A. 2d), pending on petition for certiorari, No. 327, this Term.

CONCLUSION

The decision of the court below should be reversed and the judgment of the District Court should be reinstated.

Respectfully submitted.

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OCTOBER 1941.

APPENDIX

Revised Statutes:

SEC. 3226 (as amended by Section 1113 (a) of the Revenue Act of 1926, 44 Stat. 9, and Section 1103 (a) of the Revenue Act of 1932, 47 Stat. 169). No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates. (U. S. C., Title 26, Sec. 1672.)

SEC. 3228 (as amended by Section 1112 of the Revenue Act of 1926, 44 Stat. 9). (a) All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as provided in sections 284 and 319 of the Revenue Act of 1926, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum.

(b) Except as provided in section 284 of the Revenue Act of 1926, claims for credit or refund (other than claims in respect of taxes imposed by the Revenue Act of 1916, the Revenue Act of 1917, or the Revenue Act of 1918) which at the time of the enactment of the Revenue Act of 1921 were barred from allowance by the period of limitation then in existence, shall not be allowed. (U. S. C., Title 26, Sec. 1433.)

In the Revenue Act of 1928, 45 Stat. 878, the following amendment to Section 3228 of the Revised Statutes was made by Section 619:

* * * * *

(c) Section 3228 of the Revised Statutes, as amended by section 1112 of the Revenue Act of 1926, is amended by striking out "except as provided in sections 284 and 319 of the Revenue Act of 1926" and inserting "except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes." (U. S. C., Title 26, Sec. 1433.)

In the Revenue Act of 1932, 47 Stat. 169, the following amendment to Section 3228 of the Revised Statutes was made by Section 1106:

> (a) Subsection (a) of section 3228 of the Revised Statutes, as amended, is amended by adding at the end thereof the following: "The amount of the refund (in the case of) taxes other than income, war-profits, excess-profits, estate, and gift taxes) shall not exceed the portion of the tax, penalty, or sum paid during the four years immediately preceding the filing of the claim, or if no claim was filed, then during the four years immediately preceding the allowance of the refund." (U. S. C., Title 26, Sec. 1433.)

Revenue Act of 1926, 44 Stat. 9:

> SEC. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

* * * * *

(h) Except as provided in subdivision (d) this section shall not (1) bar from allowance a claim for credit or refund filed prior to the enactment of this Act which but for such enactment would have been allowable, or (2) bar from allowance a claim in respect of a tax for the taxable year 1919 or 1920 if such claim is filed before the expiration of five years after the date the return was due.

Revenue Act of 1928, 45 Stat. 791:

SEC. 608. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST TAXPAYER.

A refund of any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) made after the enactment of this Act, shall be considered erroneous—

* * * * *

(b) in the case of a claim filed within the proper time and disallowed by the Commissioner after the enactment of this Act, if the refund was made after the expiration of the period of limitation for filing suit, unless—

* * * * *

(2) within such period, the taxpayer and the Commissioner agreed in writing to sus-

pend the running of the statute of limitations for filing suit from the date of the agreement to the date of final decision in one or more named cases then pending before the United States Board of Tax Appeals or the courts. (U. S. C., Title 26, Sec. 1674.)

Treasury Regulations 65, promulgated under the Revenue Act of 1924:

ART. 1306. *Claims for refund of taxes erroneously collected.*—Claims by the taxpayer for the refunding of taxes, interest, penalties and additions to tax erroneously or illegally collected shall be made on Form 843. All facts relied upon in support of the claim should be clearly set forth under oath. * * *

T. D. 4266, VIII-1 Cum. Bull. 111 (promulgated March 27, 1929):

* * * * *

(2) A refund or credit may be allowed after the expiration of such statutory period of limitation, even if no formal claim has been filed prior thereto, in any case in which a so-called informal or defective claim, duly filed prior to the expiration of such period and stating specifically the grounds for the refund or credit, is perfected by the filing of a claim prior to May 1, 1929, which complies with the requirements of Treasury Decision 4265, but (a) only the grounds set forth in such formal claim which were also set forth in such informal or defective claim will be considered, and (b) no claim in respect of which a suit in court has been commenced at any time may be so perfected.

T. D. 4265, VIII–1 Cum. Bull. 110 (1929) (amending Art. 1254 of Treasury Regulations 74, promulgated under the Revenue Act of 1928):

* * * * *

(1) A claim for refund or credit of any internal revenue tax, or for refund of interest or penalties, erroneously or illegally collected should be made on the form prescribed by the Treasury Department (Form 843), and should be filed with the collector of internal revenue, although a claim will not be considered defective solely by reason of the fact that it is not made on the form or that it is filed with the Commissioner of Internal Revenue. The claim must set forth in detail and under oath each ground upon which a refund or credit is claimed, and facts sufficient to appraise the Commissioner of the exact basis thereof. Any claim which does not comply with the requirements of the preceding sentence will not be considered for any purpose as a claim for refund or credit.

(2) No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds so set forth in a claim, or an amendment thereof, filed prior to the expiration of such period.

(3) These regulations shall take effect on May 1, 1929, and shall be applicable to all claims filed on or after such date, and all other regulations are modified insofar as they are inconsistent with these regulations.

No. 829

Supreme Court of the United States

October Term 1970

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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Supreme Court of the United States

OCTOBER TERM 1940

No. 826

THE UNITED STATES OF AMERICA,
Petitioner,

v.

ALICE GRAY KALES,
Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 45-53) is not officially reported. The opinion of the United States Circuit Court of Appeals for the Sixth Circuit is reported in 115 F. (2d) 497.

JURISDICTION

The judgment of the United States Circuit Court of Appeals was entered November 9, 1940 and the Govern-

ment's Petition for Rehearing was denied on December 10, 1940. The Petition for Certiorari was filed in this Court on March 8, 1941, but a copy of the Petition and Record was not received by Respondent's counsel until March 21, 1941. Petitioner invokes jurisdiction of this Court under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE

The Petition for Certiorari asks the Court to review a decision of the Circuit Court of Appeals for the Sixth Circuit denying the United States Motion to Dismiss and remanding the case to the District Court for further proceedings. No final judgment has been entered.

Taxpayer brought suit against the United States on July 7, 1936, to recover $195,710.44[1] of 1919 income taxes overpaid to Collector John A. Grogan in 1920, by reason of having computed on her 1919 income tax return, the profit on the sale of certain Ford Motor Company stock upon the basis of a March 1, 1913 value of only $9,480.34. This value had been determined in advance of the sale by Commissioner Roper. The correct March 1, 1913 value as determined by the Board of Tax Appeals was $10,000 per share (R. 13). The delay in starting suit is accounted

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(1) It is true as suggested on page 7 of the Petition for Certiorari, that the statutory interest is now equal to, or in excess of, this principal amount. However, any interest refunded would be taxable in the year of receipt. The combined normal, surtax, and defense tax rates on $200,000 of a married person's net income totals 56.1% at the present time. *Vol. 1, 1941 Standard Fed. Tax Service*, p. 804. The percentage would be higher in the event Mrs. Kales had additional net income.

for by the length of time that the taxpayer's claim for refund was under consideration by the Bureau of Internal Revenue.

Nearly five years after taxpayer's 1919 income tax return was filed, the then Commissioner of Internal Revenue fixed a new March 1, 1913 value on the Ford Motor Company stock of $2,634 per share and made a jeopardy assessment without notice or hearing in the amount of $2,627,309.95. This tax was paid under protest to the then Collector, Fred L. Woodworth, on March 24, 1925 (R. 14). Suit was brought to recover it, resulting in a judgment for taxpayer. At the same time that the jeopardy assessment was levied against the taxpayer, deficiencies approximating $31,000,000 were assessed against certain other Ford stockholders who brought action before the Board of Tax Appeals, which thereafter, on May 5, 1928, determined that the correct March 1, 1913 value of the Ford Motor Company stock was $10,000 per share, instead of $9,489.34 (See *James Couzens* 11 B.T.A. 1040, 1044). The Government took no appeal from this decision. The $195,719.44 for which the present suit is brought is the overpayment by taxpayer resulting from the computation on this valuation of $10,000 as compared with that of $9,489.34 on which the taxpayer paid the tax.

Taxpayer's protest upon payment of the jeopardy assessment to Collector Fred L. Woodworth was in the form of a letter dated March 23, 1925 (R. 19-24), a duplicate copy of which was mailed to the Commissioner of Internal Revenue on March 24, 1925. The present controversy centers around paragraphs 9 and 10 of this letter which dealt, not with the jeopardy assessment being simultaneously paid to Collector Woodworth, but

with the taxes paid nearly five years prior thereto to Collector Grogan (R. 23, 24). The taxpayer claims and the court below concluded, that these paragraphs constituted a sufficient informal claim for refund.

Thereafter, on September 24, 1928, and prior to any action having been taken thereon by the Commissioner (R. 15), taxpayer filed a formal amendment to this claim (R. 26), specifying the March 1, 1913 value of $10,000 per share as fixed and determined by the United States Board of Tax Appeals in the *James Couzens* case, *supra*, and stating the amount of income taxes overpaid by her in 1920 to Collector Grogan to be $195,710.44, as above.

The disposition of taxpayer's informal claim of March 23, 1925, and the formal amendments thereto made on September 24, 1928, was held under advisement by the Commissioner of Internal Revenue until June 4, 1935. In the interim, a hearing was held under date of June 13, 1929, on the merits of the claim before the General Counsel for the Bureau of Internal Revenue. At this hearing, the General Counsel advised taxpayer's attorneys that he was satisfied that the letter of March 23, 1925 was sufficient to constitute an informal claim for refund, and that it was filed within the statutory period (R. 42). No exceptions were ever taken to the statements in taxpayer's Supplemental Brief confirming counsel's understanding of the General Counsel's admission (R. 42). Four years later taxpayer's attorneys were informed that the delay in acting on her claim was due to the fact that the Bureau was considering claims of taxpayer's brothers (R. 43).

No formal rejection of taxpayer's claim for refund was ever made, but under date of June 4, 1935, taxpayer received a letter (Exhibit "I" of Amended Petition,

R. 34) from the Commissioner of Internal Revenue, wherein the position was taken that the payment of the judgment for $2,627,309.05, which taxpayer had recovered against Collector Woodworth, precluded the Bureau from giving further consideration in any respect to the matter of her income tax liability for the taxable year 1919. There was nothing in this letter to indicate that the Commissioner repudiated the position taken by the General Counsel six years prior thereto that the letter of March 23, 1925 constituted a sufficient informal claim for refund. On June 18, 1935 taxpayer's attorney conferred with a member of the staff of the General Counsel's office with respect to the Commissioner's letter of June 4, 1935, and said member expressed surprise at the form of the letter and its contents and stated that he had previously recommended to the General Counsel that taxpayer's claim for refund be allowed (R. 43).

Thereafter, taxpayer wrote to the Commissioner under date of August 5, 1935 (R. 35), stating that she construed the Commissioner's letter of June 4, 1935 to be a disallowance of her claim for refund. This information was of importance to taxpayer so that she might know when the statute of limitations on starting suit would commence to run. Taxpayer's final communication from the Commissioner prior to starting the suit at bar was the Commissioner's letter of August 20, 1935 (R. 37), and in this letter the Commissioner took the position that taxpayer had filed suit upon the claim filed in 1925, and, after obtaining judgment for the full amount claimed, attempted in September, 1928, to "amend the claim for refund, which gave rise to the litigation and judgment claim for refund, for the purpose of securing an additional refund of taxes for the same year". He concluded

that the refund claim filed in 1925 was merged into the judgment secured against the United States and that taxpayer was precluded from filing an amendment to the earlier claim which had been finally adjudicated.

The Commissioner clearly was acting under a mistake of fact. After filing taxpayer's letter of March 23, 1925, taxpayer on June 4, 1925 filed a separate claim for refund for the $2,627,309.05 paid to Collector Woodworth, and this was the claim that was reduced to a judgment against the Collector (and not against the United States as stated by the Commissioner in his letter of August 20, 1935). The Commissioner did not assert in his letter of August 20, 1935, that taxpayer's letter of March 23, 1925 did not constitute a claim for refund, nor did he repudiate the position taken on this point by the General Counsel years before.

Taxpayer started suit on July 7, 1936, but was required to amend her Petition by the District Court's order of October 19, 1936 (R. 10) granting the Government's motion to strike a portion of the original Petition. The United States then moved to dismiss the Amended Petition on alternative grounds (R. 38); and as one of the grounds, asserted for the first time that taxpayer's letter of March 23, 1925 "neither constitutes nor includes a claim for refund". In the alternative, it was asserted that even if the letter constituted a claim for refund, it had been rejected by the Commissioner's letter of April 6, 1925 (R. 25). As a second alternative, it was asserted that if the March 23, 1925 letter were to be construed as constituting a claim for refund, this claim became extinguished since it was merged with the judgment rendered against Collector Woodworth.

The disposition of the Motion to Dismiss was held under advisement by the District Court for over two years and an order of dismissal was finally entered February 27, 1939. In the appeal to the Sixth Circuit, the only issues raised by the United States were whether taxpayer's letter of March 23, 1925 constituted an informal claim for refund, and if so, whether it had been rejected by the Commissioner's letter of April 6, 1925. The United States did not press its argument that the claim in question had been merged with and became extinguished by the judgment against Collector Woodworth. As stated by the Circuit Court of Appeals in the last paragraph of its opinion (R. 66), the Bureau of Internal Revenue accepted taxpayer's amendment to her informal claim and considered it on its merits and "finally rejected it on a ground abandoned in this action".

In the Petition for Certiorari, the United States does not urge that the Commissioner's letter of April 6, 1925 constituted a rejection of taxpayer's informal claim for refund. It reasserts the position, however, that the letter of March 23, 1925, if otherwise a valid claim for refund, was merged with and became extinguished by the judgment in the earlier suit.

QUESTIONS PRESENTED

(1) Whether taxpayer's letter dated March 23, 1925 constituted a timely informal claim for refund.

(2) Whether said informal claim was duly amended on September 24, 1928.

(3) Whether taxpayer's claim for refund for income taxes overpaid to Collector Grogan was merged or extinguished by a judgment against Collector Woodworth; whether in any event this point was abandoned in the Circuit Court of Appeals and can now be raised before this Court.

ARGUMENT IN OPPOSITION TO THE WRIT

The Government relies on the following reasons for granting the Writ: (1) That a review is of great importance in the administration of the revenue laws; (2) That the decision below departed from the usual course of judicial proceedings; (3) That it is in conflict with the decision of another Circuit Court of Appeals; (4) That the prior judgment against Collector Woodworth forecloses taxpayer from maintaining the present suit.

(1) A review of the decision below is not of great importance in the administration of the revenue laws.

The case at bar involves many technical questions peculiarly applicable to the tax year 1919. Due to the many changes in the statutes and regulations since that time, it is extremely doubtful whether a review would be of more than historical interest. It would not have any bearing on the administration of the present revenue laws even if a case involving a comparable fact situation should ever arise again.

It would, of course, be of some importance if the decision below would provide a potential means of prolonging tax litigation as argued on page 8 of the Peti-

tion or if its effect would permit taxpayers to suspend the statute of limitations operating against claims for refund as argued on pages 13 and 14 of the Petition. We submit, however, that such consequences will not follow in the event this case is not reviewed.

Since 1919, the law has been amended so that final closing agreements fixing the March 1, 1913 value of property in advance can now be entered into between the Commissioner and taxpayer. Such agreements are binding on both sides in the absence of fraud, malfeasance or misrepresentation of a material fact. *Section 3760 Internal Revenue Code;* T. D. 4855, C.B. 1938-2 p. 52 (Appendix infra page 20). Litigation like the case at bar can be absolutely prevented, if the Commissioner refuses to give declaratory rulings without a closing agreement.

The possibility of using informal claims as a means of preventing the running of the statute of limitations ended in 1929 upon the promulgation of T. D. 4266 C.B. VIII-1, page 111 (Appendix infra page 21) providing that no refund or credit would be allowed after the expiration of the statute of limitations "*computed without regard to the filing of any so-called informal or defective claim*". An exception was made in the event timely informal claims were perfected prior to May 1, 1929. The case at bar comes within this exception, but since it is manifestly now impossible for other taxpayers to comply with these conditions, the decision in the case at bar will not constitute a precedent having any general application whatsoever.

Nor can the statute of limitations be extended by filing contingent formal claims, since the Commissioner has the remedy in his own hands of promptly disallowing the

claim. See *United States v. Memphis Cotton Oil Co.*, 288 U.S. 62, 71. The present controversy was unduly prolonged by the Commissioner's failure to take action on taxpayer's claim and a review is not necessary to afford a solution to this phase of the administration of the tax law.

(2) The decision below did not depart from the usual course of judicial proceedings.

The issues in the case at bar are separate and distinct from those in *Woodworth v. Kales*, 26 F. (2d) 178. The former case did not relate solely to the computation of the profit on the sale of taxpayer's Ford Motor Company stock as suggested on page 7 of the Petition. That case went off on a directed verdict involving the question of the validity of the 1925 jeopardy assessment. If testimony had been taken, taxpayer could have recovered the $2,627,309.05 overpaid to Collector Woodworth by establishing that the March 1, 1913 value of the stock was not less than $9,489.34 per share. It would not have been necessary to establish a higher value. The case at bar involves an overpayment to Collector Grogan, and on a trial on the merits taxpayer would recover upon proof that the March 1, 1913 value exceeded $9,489.34 per share. Petitioner admits (Petition 15) that taxpayer could not have sued Collector Woodworth for overpayments made to Collector Grogan.

The Government argues (Petition 8) that there was no timely claim for refund in the case at bar and considerable space is devoted (Petition 9-12) in an attempt to show that taxpayer's letter of March 23, 1925 was merely a protest.

We submit that the court below did not depart from the usual course of judicial proceedings in holding that this letter constituted an informal claim for refund (R. 65). It is admitted that the time for filing claims did not expire until April 14, 1925 (Petition 8) so that the letter, if a claim, was timely filed. No claim is made that it was rejected or that suit was not brought within the time provided in Section 3226, R.S.

It is argued (Petition 8) that no claim was filed prior to April 14, 1925 on Treasury Form 843 as required by Art. 1306, Reg. 65. However, ever since 1873 it has been held that applications to the Commissioner of Internal Revenue, even though fatally informal, are sufficient at least to be the foundation for an amendment so as to defeat a plea of limitation. 14 *Opinions Attorney General* 615. In 1924, the Solicitor held that an unsworn letter, not on the required form, was subject to being perfected after the statute of limitations had run. *L.O.* 1116, *C.B.* III-1, p. 350, 359. *T.D.* 4265 *C.B.* VIII-1, p. 116, promulgated in 1929, expressly provided that a refund claim would not be considered defective solely because it was not on Form 843.

It seems clear, therefore, that the sufficiency of taxpayer's letter as constituting a claim is not governed by the fact that it was not on Form 843. The Government does not argue that if it was a claim, that it was improperly amended on September 24, 1928 under the rules laid down in cases such as *United States v. Memphis Cotton Oil Co.*, 288 U.S. 62; *United States v. Factors & Finance Co.*, 288 U.S. 89; *Bemis Bro. Bag Co. v. United States*, 289 U.S. 28. These cases hold that claims, not conforming to the Regulations, may be amended after the statute of limitations has run at any time

before the original claim has been finally rejected. The Petition for Certiorari distinctly negatives the idea that taxpayer's original claim was rejected.

If the letter of March 23, 1925, particularly paragraphs 9 and 10 thereof, is read in the light of the surrounding circumstances, including the practical construction placed upon the letter by the Bureau of Internal Revenue for over ten years, we submit that it can not be said, as suggested on page 9 of the Petition, that there was an utter lack of any foundation for treating it as a claim.

That there is no basis for the Government's contention in this respect, is clear from the fact that the Commissioner who received the letter always treated it as a claim (See Par. 3 (n) of the Amended Petition, R. 17); that the General Counsel heard it on the merits and ruled that it was sufficient as an informal claim (R. 42, 43); that a refund was recommended (R. 43); and that the matter was disposed of by the Commissioner years later on other grounds (R. 34, 57). In fact, it is not even asserted in the Petition for Certiorari that the Commissioner did not understand the letter in question to be a claim for refund, or that he was in any way misled.

The argument on page 11 of the Petition, that the letter was merely a letter of protest and that paragraphs 9 and 10 thereof constituted at most a mere declaration of intention to make a claim at some later time (Petition 12), fails to take into consideration two practical points: (1) That taxpayer would have no reason in 1925 for protesting to Collector Woodworth against a payment made five years before to Collector Grogan, and (2) That since the statute of limitations was about to expire, it would have been futile to wait until some future time to file a claim for refund.

Paragraphs 9 and 10 of the letter clearly advised the Commissioner of the grounds upon which the claim for refund was based and no claim is made that he was misled or deceived by the language used or the failure to file a formal claim at that time. It is settled that the Commissioner may waive literal compliance with the Regulations—*Tucker v. Alexander*, 275 U.S. 228, 231; that even a transmittal letter accompanying a waiver is the equivalent of a notice of a claim if the Commissioner has so treated it—*Bonwit Teller & Co. v. United States*, 283 U.S. 258; that in determining the application of a statute of limitations the word "claim" should be interpreted with reasonable liberality. *United States v. Memphis Cotton Oil Co.*, 288 U. S. 62, 67, (note #2).

The fact that paragraphs 9 and 10 were couched in the future tense is grammatical rather than substantive. It was held in *Georgia, Florida & Alabama Ry. Co. v. Blish Milling Co.*, 241 U.S. 190, 198, that a telegram reading in part "*We will make claim* against railroad for entire contents of car at invoice price" constituted a present claim. In *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 384, it was held that a claim reading in part (see 61 F. (2d) 605) "*If* the audit now being made reflects a different result *it will be* submitted as additional evidence", was subject to amendment.

The court below said that taxpayer's statement was in the nature of a counterclaim and that the claim did not mature until the March 1, 1913 value of the stock was changed (R. 65). The decision, relying on the analogy to the rules regarding alternative pleadings, concluded that the letter constituted an informal claim. Part of Petitioner's motion to dismiss (R. 38) is conditional and in the alternative, but the meaning is clear enough nevertheless.

We submit therefore that the decision below comes within the rules laid down by this court and did not depart from the usual course of judicial proceedings.

(3) The decision below is not in conflict with the decisions of another Circuit Court of Appeals.

It is argued (Petition 12) that the decision below is in conflict in principle with *Art Metal Const. Co. v. United States*, 47 F. (2d) 558 (C.C.A. 2nd). There was no similarity between the claim for refund in that case and the one in the case at bar. The decision is also distinguishable by the following part of the court's opinion (page 560), which the Government did not quote in its Petition:

> "*We are not therefore dealing with a claim ineffectually couched, which advised the Commissioner that taxpayer had come to doubt the validity of any part of the tax.* In such cases we may assume arguendo that much latitude would be allowed, not only to amend as to the amount demanded, but to amplify the grounds of the claim, and perhaps to set out others."

The letter in the case at bar certainly advised the Commissioner that taxpayer had come to doubt the validity of part of the tax paid to Collector Grogan.

Ordway v. United States, 37 F. (2d) 19 (C.C.A. 2nd), is also distinguishable. The letter in that case was written at a time when no claim in fact existed. The court held on page 21, that if the only difficulty with it had been lack of proper form "*or if any claim had at that time arisen, we might overlook all defects*". In the case at bar, the letter of March 23, 1925 was filed long after

the overpayment occurred. In *Philipsborn v. United States*, 53 F. (2d) 133 (Ct. Claims), it was pointed out, page 133, that the letter there involved "makes no mention of a claim for refund and uses no language which can be construed as making such claim". *Baltimore & Ohio R.R. v. United States*, 260 U.S. 565, merely held that a preliminary request for an informal ruling before affixing stamps to certain deeds did not constitute a claim for abatement or refund.

Payment is a condition precedent to making a claim for refund. *Rock Island, Arkansas & Louisiana R.R. Co. v. United States*, 254 U.S. 141. No claim for refund can be made *until after* the taxes have been paid. See *Kings County Savings Institution v. Blair*, 116 U.S. 200, 205, where a protest endorsed on the checks by which the taxes were paid, was held to be ineffectual.

Waters v. United States, 12 F. Supp. 658, is hence distinguishable. The taxes there involved were not paid before the letter under consideration was filed. The District Court's opinion indicates that payment was transmitted simultaneously with the letter but the Record itself shows that payment was in fact made after the date of the letter, which fact was mentioned in the opinion below (R. 66). The *Waters* case is distinguishable on other grounds as well. For example, there was no evidence that either the taxpayer or the Commissioner regarded the letter as other than a statement of intention to file a claim. No grounds for refund were stated, and no copy of the letter was filed with the Commissioner as in the case at bar.

Hence, we submit the decision in the case at bar is not in conflict with any other decisions.

(4) The prior judgment against Collector Woodworth does not foreclose taxpayer from maintaining the present suit.

It is argued briefly on page 11 of the Petition, that the claim of March 23, 1925 ceased to have any vitality after the decision in 26 F. (2d) 178.

Again on page 14, it is claimed that the former judgment forecloses Respondent from maintaining the present suit.

Both of these contentions were decided against the Government in *Sage v. United States*, 250 U.S. 33. In that case, taxpayer filed a claim for refund, and thereafter made a partial recovery against the Collector to whom the tax was paid. Subsequently and without filing a new claim, suit was brought in the Court of Claims for the residue. The Solicitor General argued, page 34, that the claim was merged into, and extinguished by, the prior judgment. The Court of Claims dismissed the suit on demurrer. This Court however, reversed, holding that the former judgment was not a bar.

If one claim will support two suits, then it would seem that two claims for overpayments made to two different Collectors would support two suits against two different defendants.

The liability of each Collector was personal. Woodworth could not have been sued for payments made to Grogan, his predecessor. *Smietanka v. Indiana Steel Co.*, 257 U.S. 1; *Union Trust Co. v. Wardell*, 258 U.S. 537; *Levy v. Wardell*, 258 U.S. 542. See also *Graham and Foster v. Goodcell*, 282 U.S. 409, 430; *Tait v. Western Md. Land Ry. Co.*, 289 U.S. 620, 627.

Petitioner argues on page 14, that the maintenance of the case at bar permits taxpayer to split a cause of action. This is in effect a plea of res adjudicata. *Western Maryland Ry. Co. v. United States*, 23 F. Supp. 554, 555. However, this conclusion is contrary to the cases cited in the preceding paragraph, that the liability of each Collector is several. Furthermore, in addition to having a defendant different than the one in the prior suit, the present issues are different. See page 10, *supra*.

It is intimated on page 15 of the Petition, that taxpayer is attempting to contest the same taxes by successive suits in the same forum, and that Congress could never have intended to permit this. Taxpayer is not, however, litigating over the same tax payments that were involved in the prior suit, and so long as the Commissioner himself is permitted to make successive assessments on taxes for the same year, there is a possibility of successive suits. Litigation over one assessment might be concluded before the Commissioner made another assessment, and it would seem to be absurd to conclude that Congress intended that taxpayers in such a situation would be deemed to have exhausted their legal remedies by their first suit.

No authority is cited for the proposition urged on page 15 that a suit against Collector Woodworth is res adjudicata as to issues that admittedly could not have been litigated in that case, merely because taxpayer might have brought suit in the Court of Claims. The right to sue Collectors in the District Court is a valuable right to taxpayers, since they can obtain a Jury Trial in the district within which they reside. No reason occurs to us why taxpayers should be forced to sue at their

peril in the Court of Claims. Taxpayer's brothers' estates are a good illustration of the necessity of successive suits to do justice. In their 1919 income tax cases before the Board of Tax Appeals it was determined that they had likewise made overpayments based upon a $10,000 March 1, 1913 value of the Ford Motor Company stock which they had sold. The Commissioner refused to make refund and it was necessary to reduce the claim to judgment in the Court of Claims to get their money back. *Goodenough v. United States*, 19 F. Supp. 254. If Petitioner's theory was adopted, the proceedings in the Board of Tax Appeals would have barred their recovery in the Court of Claims.

The District Court's decision in *Western Maryland Ry. Co. v. United States*, *supra*, also cited on page 15 of the Petition, is not in point. This case merely holds that a tax and resulting interest are to be treated as constituting a single liability, and hence there can not be a recovery of the tax in a suit against the Collector and a recovery of the interest in a suit against the United States. The tax and interest could have both been recovered in the former suit. The suit at bar is distinguishable, since it is freely admitted that the tax here involved could not have been recovered in the prior suit.

There is no substance to the argument on page 15, that liability for a single tax year can be kept in suspense by a series of suits which could be expanded indefinitely by ingenuity of counsel. If the Commissioner saw fit to make successive assessments and the taxes were paid to different Collectors, more than one suit for the same tax year might be possible. Obviously, this result could not be controlled by the taxpayer's counsel.

CONCLUSION

It is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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April 7, 1941.

APPENDIX

Internal Revenue Code

SEC. 3760. CLOSING AGREEMENTS.

(a) AUTHORIZATION. The Commissioner (or any officer or employee of the Bureau of Internal Revenue, including the field service, authorized in writing by the Commissioner) is authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal revenue tax for any taxable period.

(b) FINALITY. If such agreement is approved by the Secretary, the Under Secretary, or an Assistant Secretary, within such time as may be stated in such agreement, or later agreed to, such agreement shall be final and conclusive, and, except upon a showing of fraud or malfeasance, or misrepresentation of a material fact—

(1) The case shall not be reopened as to the matters agreed upon or the agreement modified by any officer, employee, or agent of the United States, and

(2) In any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, refund or credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded.

T.D. 4855 C.B. 1938-2, p. 252 (promulgated August 18, 1938).

• • • •

ARTICLE 1. CLOSING AGREEMENTS RELATING TO TAX LIABILITY IN RESPECT OF INTERNAL REVENUE TAXES.—Closing agree-

ments provided for in section 606 of the Revenue Act of 1928, as amended, may relate to any taxable period ending prior or subsequent to the date of the agreement. * * * With respect to taxable periods ending subsequent to the date of the agreement, the matter agreed upon may relate only to one or more separate items affecting the tax liability of the taxpayer. The following, among others, are examples of the latter type of closing agreement: (1) A taxpayer may sell a portion of his holdings in a particular stock. A closing agreement may be entered into fixing the cost or other legal factor determining the basis for computing gain or loss on such sale, and, at the same time fixing the cost or other legal factor determining the basis (unless or until the statute is changed to require the use of some other factor to determine basis) of the remaining portion of the stock still held by the taxpayer upon which gain or loss will be computed when the taxpayer sells such stock in a later year; (2) *if the taxpayer is undecided whether to sell property or hold it, or as to the price at which to sell it, a closing agreement may be entered into determining the market value of the property as of March* 1, 1913, *for future taxable periods, prior to the consummation of the sale by the taxpayer.* * * * (Italics added.)

T.D. 4266 C.B. VIII-1, p. 111 (promulgated March 27, 1929).

To All Collectors of Internal Revenue and Others Concerned:

(1) Except as provided in paragraph (2), a refund or credit of any internal revenue tax will not be allowed in any case after the expiration of the statutory period of limitation applicable to the filing of a claim therefor (*computed without regard to the filing of any so-called informal or defective claim*) unless prior to the expiration of such period a formal

claim has been duly filed which complies with all the requirements of the regulations applicable at the time such claim was filed, nor will any claim which does not comply with such regulations be considered for any purpose as a claim for refund or credit. (See e.g. Reg. 14; art. 1036, Reg. 45 and 62; art. 1396, Reg. 65; art. 1304, Reg. 69; art. 1254, Reg. 74; Law Opinion 1116 (C.B. III-1, 350); T.D. 4265 (page 110, this Bulletin).) (Italics added.)

(2) A refund or credit may be allowed after the expiration of such statutory period of limitation, even if no formal claim has been filed prior thereto, in any case in which a so-called informal or defective claim, duly filed prior to the expiration of such period and stating specifically the grounds for the refund or credit, is perfected by the filing of a claim prior to May 1, 1929, which complies with the requirements of Treasury Decision 4265, but (a) only the grounds set forth in such formal claim which were also set forth in such informal or defective claim will be considered, and (b) no claim in respect of which a suit in court has been commenced at any time may be so perfected.

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No. 35

IN THE

Supreme Court of the United States

October Term 1941

THE UNITED STATES OF AMERICA,
Petitioner.

v.

ALICE GRAY KALES,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit

---

BRIEF FOR RESPONDENT

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No. 35

THE UNITED STATES OF AMERICA,
Petitioner,

v.

ALICE GRAY KALES,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENT

Opinions Below

The opinion of the District Court (R. 32-38) is not officially reported. The opinion of the United States Circuit Court of Appeals for the Sixth Circuit (R. 43-49) is reported in 115 F. (2d) 497.

Jurisdiction

The judgment of the United States Circuit Court of Appeals was entered November 9, 1940 (R. 43). The Government's petition for rehearing was denied on December 10, 1940 (R. 50). Certiorari was granted by this Court April 28, 1941 (R. 51). Petitioner invokes the jurisdiction of this Court under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented

(1) Whether the Court below erred in concluding that taxpayer's letter dated March 23, 1925 (R. 14-18), a duplicate of which was filed with the Commissioner of Internal Revenue, constituted an informal claim for refund for 1919 income taxes paid to Collector John A. Grogan in 1920.

(2) If said letter constituted a claim, whether it was duly amended on September 24, 1928.

(3) If said letter constituted a claim, whether it was merged with and extinguished by a judgment against Collector Fred L. Woodworth for 1919 income taxes overpaid to him in 1925.

(4) Whether the Court below erred in concluding that taxpayer's cause of action was not barred by any statute of limitations.

GENERAL STATEMENT OF CASE

The Brief for the Government is, in our view, inaccurate in so many respects in its statement of the facts that, while we regret the necessity, we feel that we should not only specifically refer to the inaccuracies and omissions but should also submit our own statement of the facts. We first list the errors and omissions referring to the pages of the brief on which they are found and then follow with our Statement of the Facts.

Errors and Omissions

1. Page 2. The statement that taxpayer in a prior suit was awarded a large refund of income taxes "resulting from a recomputation of her profit" upon her sale

of Ford stock and in this suit seeks an additional refund for the same year based upon a further recomputation of that profit is not accurate. The earlier suit was for the refund of a jeopardy deficiency assessment resulting from the Department fixing a new base value of the stock lower than that which had been set by it to induce the sale by the taxpayer. This present suit is for an overpayment of her original tax and is due to the determination of the base value by the Board of Tax Appeals at a higher figure than originally set by the Department.

2. Page 4. The ten numbered paragraphs did assert the illegality of the deficiency assessment but the last two also gave notice of a claim for refund or the original assessment of 1920. Not all of these paragraphs asserted that the previous valuation could not be reopened. They asserted other grounds of invalidity. It is this so called letter of protest which the taxpayer contends is an informal claim of refund.

3. Page 5. Reference to the Commissioner's letter of April 6, 1925 (R. 18) is omitted.

4. Page 5. The inference at the top of this page is that the contentions in paragraphs 9 and 10 were limited to the litigation in the taxpayer's own case whereas there was no such limitation. She notified the Commissioner of her claim if the stock was revalued by a competent authority in *any* case or *any* further proceeding.

5. Page 5. Reference to the hearings on the claim, the conferences with the Internal Revenue Department and correspondence therewith and the information conveyed to the taxpayer that it had been recommended that the claim be allowed is omitted.

6. Page 13. There can be no question but that the taxpayer treated the March 23, 1925 letter as an informal claim for refund. It was filed immediately before the expiration of the statute of limitations. It was so treated in her correspondence with the Department. Her position that it was an informal claim was the subject of briefs to, and hearing in, the Department. She filed an amended claim specifically referring to it (R. 19-21). Reference to these facts is omitted in the brief.

7. Page 15. Taxpayers' position was that the Government could not reopen the Roper valuation and that valuation "should stand". At the same time, she said that this valuation was substantially less than the fair value of said stock on the basic date and the stock was grossly undervalued by the Department and that she should recover a refund from the Collector to whom the tax was paid or from the Government of the United States. The brief states taxpayer's position inaccurately.

8. Page 15. Taxpayer not only filed on June 4, 1925 a formal claim for refund of the jeopardy assessment, she filed on September 21, 1928 an amended refund claim based on the revaluation of the stock at $10,000 per share.

9. Page 16. It may be true that the "central ground of protest was that the Commissioner had no power to reopen the valuation." But that was only one of the grounds set forth in the March 23, 1925 letter.

10. Page 17.. Paragraphs 9 and 10 do not disclose the "one basic contention" that the Commissioner had no authority to reconsider a determination made by his predecessor in office. The language of these paragraphs is clear to the effect that they deal also with a

claim other and further than that for the jeopardy assessment. The judgment for the refund of the latter assessment did not give the taxpayer everything she demanded in the March 23, 1925 letter.

11. Page 18. The letter of the Commissioner of June 4, 1935 (R. 24) did not assert that the refund claim of September 21, 1928, was not timely. The letter of August 20, 1935 (R. 25, 26) expressly refers to taxpayer's letter dated March 23, 1925 and filed March 24, 1925 as a "claim for refund." Reference to these facts is omitted in the brief.

Statement of the Facts

(Page references are to the Transcript of Record in this Court.)

Mrs. Kales, the taxpayer, was on and prior to March 1, 1913, the owner of 525 shares of stock in the Ford Motor Company.

On May 19, 1919, Daniel C. Roper, Commissioner of Internal Revenue, determined the March 1, 1913 value of the Ford Motor Company stock to be $9,489.34 per share (R. 8) and thereafter taxpayer sold her 525 shares of stock for $12,500 per share (R. 9). As stated on page 3 of the Government's brief, taxpayer in filing her 1919 income tax return computed the profit on this sale upon the basis of the March 1, 1913 value of $9,489.34 so fixed by Commissioner Roper and paid Collector Grogan a tax in the amount of $1,216,086.26.

Collector Grogan went out of office on, to-wit, November 27, 1921, and died on, to-wit, November 30, 1923, and was succeeded in office by Collector Fred L. Woodworth who went out of office on August 15, 1933, and who is still out of office (R. 9).

On March 13 or 14, 1925 (R. 10), nearly five years after taxpayer's 1919 income tax return had been filed, and shortly before the period of the statute of limitations was about to expire, the then Commissioner of Internal Revenue, on his own initiative, and without notice or hearing, fixed a new March 1, 1913 value on the Ford Motor Company stock of $2,364.00 per share, and made a jeopardy assessment against taxpayer in the amount of $2,627,309.05. This tax was paid under protest to Collector Fred L. Woodworth on March 24, 1925 (R. 10).

At the same time that the jeopardy assessment was levied against the taxpayer, deficiencies approximating $31,000,000 were assessed against certain other Ford Motor Company stockholders who brought action before the Board of Tax Appeals which, thereafter, on May 5, 1928, determined that the correct March 1, 1913 value of the Ford Motor Company stock was $10,000 per share. (See *James Couzens*, 11 B. T. A. 1040, 1044.) The Government took no appeal from this decision.

Taxpayer's protest upon payment of the jeopardy assessment to Collector Fred L. Woodworth was in the form of a letter dated March 23, 1925 (R. 14-18), a duplicate copy of which was mailed to the Commissioner of Internal Revenue and received by him on March 24, 1925. The present controversy centers around paragraphs 9 and 10 of this letter which dealt, not with the jeopardy assessment being simultaneously paid to Collector Woodworth, but with the overpayment of income taxes made nearly five years prior thereto to Collector Grogan (R. 17-18). The taxpayer claims, and the Court below concluded, that these paragraphs constituted a sufficient informal claim for refund under the facts and circumstances in the case. Paragraphs 9 and 10 read as follows:

"9. This taxpayer further advises you and the Commissioner of Internal Revenue and the United States Government, that, while it is her position that the deficiency assessment is so illegal and void, as is set forth in paragraphs 1 to 8 above, and is likewise illegal and void and contrary to law for other reasons, that if it should be held either by the Internal Revenue Department, on the hearing of a claim for refund or otherwise, or by the Board of Tax Appeals, or by any other Board or body having jurisdiction thereof to which this controversy should be submitted, or by any court of competent jurisdiction thereof, that the former assessment as made by Commissioner Daniel C. Roper should be set aside and vacated, and that the March 1, 1913, value of the said Ford Motor Company stock as fixed by Daniel C. Roper, Commissioner of Internal Revenue, and his finding and determination as to same shall be vacated, set aside, reopened or reversed, and the contentions of this taxpayer as heretofore set forth be overruled then this taxpayer will show and claim and insist that the valuation of $9,489.34 on each share of Ford Motor Company stock fixed by the said Daniel C. Roper, Commissioner of Internal Revenue, is substantially less than the fair value of said stock on the basic date and that the said stock was greatly undervalued by the Commissioner and that the fair value of said stock per share as of March 1st, 1913, was greatly in excess of $9,489.34, and that therefore this taxpayer should recover from the Collector of Internal Revenue, to whom said tax on said transaction was paid, or from the Government of the United States, such portion of the tax heretofore paid on said transaction as may be found to have been excessive when the fair value of said stock as of March 1, 1913, shall have been determined and the tax on the basis thereof shall have been recomputed.

"10. Protestant, while insisting for the reasons among others above stated, that the valuation of said stock as of March 1, 1913, made by the Depart-

ment as aforesaid and approved by the Secretary of the Treasury should stand, yet if for any reason a re-valuation shall be had protestant will insist that said stock as valued by the Department as aforesaid, was grossly undervalued and that she was required to and did pay an excessive tax upon an alleged excessive profit arising from said sale, and she will claim the right to a refund of said tax to the extent of such excess. Considering the laches of the Department and the fraud (actual or constructive) perpetrated upon protestant, she will also claim that the running of the statute of limitations against her right to said refund is postponed until a reasonable time after any such revaluation."

Thereafter, on to-wit, September 24, 1928, and prior to any action having been taken thereon by the Commissioner (R. 11), taxpayer filed a formal amendment bearing the jurat date of September 11, 1928, to this informal claim (R. 19), specifying the March 1, 1913 value of $10,000 per share as fixed and determined by the United States Board of Tax Appeals in the *James Couzens* case, supra, computing her profit on that basis and making claim for the amount of income taxes theretofore overpaid by her in 1920 to Collector Grogan in the amount of $195,710.44. (In certain of the correspondence (R. 24, 25) the filing date of the formal amendment was given as September 21, 1928. There was only one formal amendment.)

On June 4, 1925, taxpayer filed a separate claim for refund for the $2,627,309.05 paid under protest to Collector Woodworth (R. 10). Suit was thereafter brought against him in the District Court resulting in a directed verdict in favor of the taxpayer for the $2,627,309.05. On appeal, this judgment was affirmed, the Court holding that the successor Commissioner lacked authority to reopen the original assessment based on Commissioner Roper's March

1, 1913 value of the Ford Motor Company stock. *Woodworth v. Kales*, 26 F. (2d) 178 (C. C. A. 6th)*

The matter of the refund of the $195,710.44 overpaid in 1920 to Collector Grogan was held under consideration by the Bureau of Internal Revenue for nearly seven (7) additional years after the amendment of September 24, 1928, or a total of approximately eleven (11) years. On June 5, 1929, taxpayer's counsel was given an opportunity to present oral argument "on the pending refund claim filed by Alice G. Kales" (R. 22). A hearing on the merits of the claim was held on June 13, 1929 (R. 11) and a voluminous brief was filed supporting taxpayer's contention that the letter of March 23, 1925 was a sufficient informal claim for refund of the $195,710.44 (R. 29). At this hearing, the General Counsel for the Bureau stated that he was satisfied that the protest (the letter of March 23 ,1925) was sufficient to constitute an informal claim for refund and that it was filed within the statutory period (R. 20). Thereafter, under date of June 21, 1929, taxpayer's counsel prepared and forwarded to the General Counsel a Supplemental Brief wherein it was stated (R. 29):

> "We understand that it is admitted that our informal claim for refund, filed March 24, 1925, was filed within the period limited by the statute and was sufficient as an informal claim for refund; that the amendment to this informal claim for refund filed on September 11, 1928, sufficiently complies

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* Counsel for the Government in a note on page 16 of his brief, says:

> "It seems clear that her victory in that case (*Woodworth vs. Kales*, 26 F. (2d) 178) was wholly unwarranted, for it has since been repeatedly held that the determination of the Commissioner of Internal Revenue can be reopened at any time."

citing *Burnet v. Porter*, 283 U. S. 230; *Commissioner v. Newport Industries*, 121 F. (2d) 655. This statement is, in itself, not warranted. The opinion of the Sixth Circuit in 26 F. (2d) 178 has not been criticized. It was not referred to in the *Newport Industries* case, 121 F. (2d) 655. It was referred to in the case of *McIlhenny v. Commissioner*, 39 F. (2d) 356, which is cited in the *Burnet case*, but the facts in the *McIlhenny case*, as well as those in the *Newport Industries case*, distinguish those cases from the *Kales case*.

> with the requirements of the statute and the regulations so that it is now admitted that the taxpayer's claim for refund is proper both as to time of filing and formal requirements. The sole question is as to whether or not the proceedings in the District Court were of such a nature that this claim for refund cannot now be allowed * * *."

This Supplemental Brief was retained by the Bureau of Internal Revenue and no exceptions were ever taken to the foregoing statements (R. 29).

On January 27, 1933, taxpayer's counsel had a conference with a member of the staff of the General Counsel of the Bureau of Internal Revenue who again reiterated that they were satisfied that the informal claim was filed in time and that it was good as an informal claim and that the delay in acting was due to the fact that the Bureau was considering certain claims of taxpayer's brothers (R. 30). The brothers' claims were thereafter reduced to judgment in the Court of Claims on May 3, 1937, in the case of *Goodenough v. United States*, 19 Fed. Supp. 254.

On February 7, 1933, taxpayer's attorneys were advised "that early attention would be given to Mrs. Kales' claim" (R. 23). In response to letters inquiring as to the status of taxpayer's claim, counsel were advised on July 31, 1933, that it was hoped "that a conclusion may be reached in the matter at an early date" (R. 23) and again on February 9, 1935, "that every effort" will be made to reach a conclusion and dispose of the matter within a few weeks" (R. 24).

There is no dispute but that all these negotiations, hearings and correspondence dealt with the claim for the $195,710.44 and with no other claim.

Thereafter under date of June 4, 1935, taxpayer received a letter (Exhibit "I" of Amended Petition, R. 24)

from the Commissioner of Internal Revenue, wherein the position was taken that the payment of the judgment for $2,627,309.05, which taxpayer had recovered against Collector Woodworth, precluded the Bureau from giving further consideration in any respect to the matter of her income tax liability for the taxable year 1919. The Commissioner did not repudiate the position taken by the General Counsel six years prior thereto that the letter of March 23, 1925, constituted a sufficient informal claim for refund. On June 18, 1935, taxpayer's attorney conferred with a member of the staff of the General Counsel's office with respect to the Commissioner's letter of June 4, 1935, and said member expressed surprise at the form of the letter and its contents and stated that he had previously recommended to the General Counsel that taxpayer's claim for refund be allowed (R. 30).

Thereafter, taxpayer wrote to the Commissioner under date of August 5, 1935 (R. 24), stating that she construed the Commissioner's letter of June 4, 1935, to be a disallowance of her claim for refund. This information was of importance to taxpayer so that she might know when the statute of limitations on starting suit would commence to run. Taxpayer's final communication from the Commissioner prior to starting the suit at bar was the Commissioner's letter of August 20, 1935 (R. 25), and in this letter the Commissioner took the position that taxpayer had filed suit upon the claim filed in 1925, and after obtaining judgment for the full amount claimed, had attempted on September 21, 1928, to "amend the claim for refund, which gave rise to the litigation and judgment claim for refund, for the purpose of securing an additional refund of taxes for the same year." He concluded that "the refund claim filed in 1925 was merged into the judgment secured by you against the United States and you were, therefore, precluded from filing an amendment to

the earlier claim which had been finally adjudicated" (R. 26).

The Commissioner was acting under a serious misapprehension of the facts, and since the Government relies heavily on the merger theory first enunciated in the Commissioner's letter of August 20, 1935, it seems appropriate to point out some of these errors at this time.

In the first place, he was wrong in assuming that the March 24, 1925, claim was the basis of the suit in the prior litigation. Taxpayer filed a separate refund claim for the $2,627,309.05 paid to Collector Woodworth on June 4, 1925 (Par. 3 [i] of Amended Petition, R. 10). This claim was reduced to judgment but no attempt was made to amend it to secure an additional refund. The September 21, 1928, amendment was expressly captioned "Amendment to Claim for Refund Filed March 24, 1925" (R. 20).

The Commissioner was also wrong in stating that taxpayer had secured a judgment against the United States. The prior judgment was against Collector Woodworth which fact, as will be pointed out in our argument, is of vital importance in determining whether the present action is barred by the prior adjudication.

It should be pointed out that, in his letter of August 20, 1935, the Commissioner did not repudiate the position taken years before by the General Counsel, that the letter of March 23, 1925, constituted a claim for refund. On the contrary, the Commissioner expressly treated it as a claim on which the prior suit had been based. It was the 1928 amendment which he claimed the Bureau had not considered or treated as a claim.

Taxpayer started suit on July 7, 1936, but was required to amend her Petition by the District Court's order of October 19, 1936 (R. 7) granting the Government's motion to strike a portion of the original Petition. On December

4, 1936, the United States Attorney moved to dismiss the Amended Petition on alternative grounds (R. 26); and as one of the grounds, asserted for the first time during the eleven (11) years the matter had been under consideration, that taxpayer's letter of March 23, 1925, "neither constitutes nor includes a claim for refund." In the alternative, it was asserted that even if the letter constituted a claim for refund, it had been rejected by the Commissioner's letter of April 6, 1925 (R. 18). As a second alternative, it was asserted that if the March 23, 1925, letter were to be construed as constituting a claim for refund, said claim became extinguished by virtue of its merger with the judgment rendered against Collector Woodworth.

The disposition of the Motion to Dismiss was held under advisement by the District Court and an order of dismissal was finally entered February 27, 1939. In the appeal to the Sixth Circuit, the only issues raised by the United States were whether taxpayer's letter of March 23, 1925, constituted an informal claim for refund, and if so, whether it had been rejected by the Commissioner's letter of April 6, 1925. The United States did not press its argument that the claim in question had been merged with and became extinguished by the judgment against Collector Woodworth. The Circuit Court of Appeals in the last paragraph of its opinion (R. 49) said "the Internal Revenue Bureau accepted appellant's amendment to her informal claim and considered it on its merits and finally rejected it on a ground *abandoned* in this action."

In its brief before this Court, the Government does not claim that the Commissioner's letter of April 6, 1925 (R. 18), constituted a rejection of taxpayer's informal claim for refund.

ARGUMENT

Introductory

We do not disagree with the Government's statement on page 12 of its brief that every suit for refund must be founded upon a valid and timely claim for refund. We note that it admits that the last date for filing a timely claim in this matter was April 14, 1925.

It is taxpayer's position that the Court below correctly held that her letter of March 23, 1925, filed with both the Collector and Commissioner of Internal Revenue constituted a timely informal claim for refund for the taxes overpaid Collector Grogan in 1920; that it was duly amended on September 24, 1928; that it did not become merged with or extinguished by the judgment against Collector Woodworth for the taxes overpaid him in 1925 and that the former judgment against the Collector is in no respect res judicata of the claim, demand and issue in the present suit.

I.

The Court below correctly held that taxpayer's letter of March 23, 1925, constituted an informal claim for refund of taxes overpaid in 1920 to Collector Grogan.

There is no dispute in the record that the Commissioner treated taxpayer's letter of March 23, 1925, as a sufficient informal claim for refund over a period of many years and finally disposed of the matter on entirely different grounds.

It was alleged (Amended Petition 3 [n], R. 12) that "the Bureau through its General Counsel and its officers and agents had always treated the amendment (of September 24, 1928) and the refund claim of March 24, 1925, as claims from the time they were filed." Hearings on the merits were held during which the General Counsel stated he was satisfied that the letter was sufficient to constitute an informal claim for refund (R. 29); no exceptions were ever taken to the statements in taxpayer's supplemental brief "that it is admitted that our informal claim for refund, filed March 24, 1925, was filed within the period limited by the statute and was sufficient as an informal claim for refund." It is also clear from the correspondence that it was assumed that taxpayer had a refund claim pending. In fact, a member of the General Counsel's staff advised taxpayer's counsel that he had recommended that the claim for refund be allowed (R. 30).

The matter was finally disposed of on other grounds. After suit was started and reached the United States Attorney's hands, it was for the first time alleged that the entire proceedings were abortive because the letter of March 23, 1925, was not sufficient to constitute a claim.

Even in the brief before this Court, the Government does not argue that the Commissioner was misled in any manner by the form of taxpayer's letter, or that he did not in fact always understand it to constitute a claim.

We submit that the Court below correctly construed the letter of March 23, 1925 as constituting an informal claim for refund, and that any imperfections that it might have contained were long since waived by the Commissioner.

(a) The word "claim" is interpreted liberally in determining the application of statutes of limitation.

As pointed out in *Factors' & Finance Co. v. United States*, 56 F. (2d) 902, 905 (Court of Claims), affirmed 288

U. S. 89, there are two groups of statutes relating to refund claims: (1) Those giving the Commissioner jurisdiction to refund overpayments and (2) Section 3226 Revised Statutes (set forth in full in Appendix, page 70).

Included in the first group of statutes are those provisions found in all the Revenue Acts making it mandatory upon the Commissioner to make refunds, if upon examination of any return it appears that an amount of income tax has been paid in excess of that properly due provided "a claim therefor is filed by the taxpayer" within the proper time.

Section 252 of the Revenue Act of 1918 (Appendix page 70) applies to the case at bar. The corresponding sections of the subsequent revenue acts are Section 252 of the Revenue Act of 1921; Section 281 of the Revenue Act of 1924; Section 284 of the Revenue Act of 1926; Sections 322 of the Revenue Acts of 1928, 1932, 1934, 1936, 1938 and the 1939 Internal Revenue Code.

Section 252 of the Revenue Act of 1918 does not define the term "claim" nor specify its form or contents. It does not require the "claim" to be under oath or to set forth a statement of facts or the theory upon which it is based. Consequently, as will be more fully set forth later in this brief, the courts have construed the word "claim" very broadly and have held informal, defective or blanket claims contained in letters, briefs, protests or even waivers of the statute of limitations, to be sufficient to give the Commissioner jurisdiction to make refunds.

However, if the Commissioner should fail to make refund, an unsworn, defective, informal claim, unless amended, would not support a court review. Section 3226 Revised Statutes precludes suit until a claim for refund has been filed with the Commissioner of Internal Revenue "according to the provisions of law in that regard, and

the regulations of the Secretary of the Treasury established in pursuance thereof." The various regulations in effect prior to May 1, 1929, did require refund claims to be under oath and to set forth all the facts relied upon. Art. 1036, Reg. 45; Art. 1036, Reg. 62; Art. 1306, Reg. 65; Art. 1304, Reg. 69; and Art. 1254, Reg. 74. The regulations were amended March 27, 1929, effective May 1, 1929, by T. D. 4265 C. B. VIII-1 page 110, after the filing of taxpayer's amendments to her refund claim on September 24, 1928, in which it was provided that a claim would not be considered defective solely by reason of the fact that it was not on Form 843.

The courts have been extremely liberal in interpreting the word "claim" in determining the application of statutes of limitation and also, as pointed out on page 19 of the Government's Brief, this Court has gone far in permitting amendments. This is not surprising, for if the United States has collected excess taxes from its citizens, it is only right that the amount overpaid should be refunded. The reason is stated in *United States v. Memphis Cotton Oil Co.*, 288 U. S. 62, 67. In note No. 2 the court referred to official statistics and said:

> "Official statistics indicate that 'eighty-five 20/100 per cent of all the overassessments *are attributable* to clerical or bookkeeping adjustments or *to causes beyond the control of either the Treasury or the taxpayer, that is to adjustments after the payment of taxes based upon causes which could not fairly be considered prior to the payment.*' * * * These statistics, covering adjustment of taxes under the Act of 1928, give support to the conclusion that in determining the application of a statute of limitations *the word 'claim' should be interpreted with reasonable liberality.*"

As applied to taxes, it was ruled in 14 *Opinions Attorney General* 615, as early as 1873, as follows:

> "Whenever a bona fide litigant or claimant brings his cause before a tribunal having jurisdiction, I apprehend that such proceeding even when 'fatally' informal *is usually held to be an action or claim* so far at least as to be a foundation for an amendment and thus be capable of becoming perfect by relation to its original institution and so of defeating a plea of 'limitation' which otherwise might avail the defendant."

See also the Solicitor's 1924 opinion, L. O. 1116, C. B. III-1 p. 350, 359, where an unsworn letter to the Commissioner asking reconsideration of a claim was held to meet the requirements of an informal claim.

The sufficiency of a claim does not necessarily depend upon the language used. Circumstances surrounding the filing of the document alleged to constitute a "claim," such as the amount of information already possessed by the Commissioner and the manner in which it is treated by him, have great weight.

Thus in *Bonwit Teller & Company v. United States*, 283 U. S. 258, at pages 263-265, a waiver of the statute of limitations and a transmittal letter reading "In accordance with your request, we enclose you herewith waiver," were held to constitute a claim. After the statute of limitations had run, a formal claim was filed. It would seem hard to spell out a claim for refund from these facts if the word "claim required an express demand for the return of the tax or a call for action on the part of the Commissioner. The Court pointed out that before the waiver was filed the Bureau had made a jeopardy assessment and thereafter

determined that there was an apparent overassessment. The Court said at pages 263-5:

> "• • • The Government's point comes down to the question *whether the waiver and the letter transmitting it together with what went before amounted to the filing of a claim* within the meaning of the statute.
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> • • • • •
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> "• • • Plaintiff's prompt execution and return of the waiver and the bureau's acceptance of it clearly show that both considered the facts already found and reported a sufficient basis for plaintiff's claim.
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> *"The Commissioner, within the time allowed, was advised of the grounds on which plaintiff's right to refund rested,* and was not misled or deceived by plaintiff's failure to file formal claim, *and was fully warranted in holding that the waiver and earlier documents were sufficient.*

In *Lasher v. United States*, 65 Ct. Claims 295, 6 Am. Fed. Tax Rep. 7448, a letter of protest was held to constitute a claim entitling taxpayer to interest on a refund. The factual situation was in many respects similar to the case at bar. After one additional assessment, a second was proposed; and in a letter of protest dated August 26, 1922, general reference was made to the failure to allow, as a deduction from gross income of an estate, the Federal Estate taxes which had accrued. Attached to the letter was an affidavit in which it was stated on information and belief that the taxpayer "has paid an aggregate amount of income and surtaxes for 1917, 1918 and 1919 which exceeds the aggregate amount of her actual tax liability for those years," but there was no demand for any specific sum. Thereafter the Commissioner determined the exact amount of the overpayment but refused to refund the statutory interest on the grounds that there had been no claim for refund.

The court held that the letter constituted a claim, and allowed recovery, saying:

> "This determination was in strict accord with plaintiff's contention in the letter of August 26, 1922, *except only that plaintiff did not make, and in the nature of the transaction could not at that time have made, a demand for a specific sum.* • • •
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> "By the letter of August 26, 1922, which contained all the essential information required to be set out in the official forms, plaintiff stated the specific ground upon which she claimed that her taxes for 1918 had been overpaid. Regardless of the form, it was the assertion of a right intelligibly expressed, and it was considered and allowed by the commissioner."

In *Jones v. United States*, 5 F. Supp. 146 (Court of Claims), the taxpayer filed an unsworn letter with the Collector on March 12, 1923, stating that in view of the fact that the statute of limitations was about to run that "*protest is hereby made* to the method used by the department in the computation of our invested capital." The letter concluded with a request for consideration. The word "refund" was not used in the letter, nor was the amount to be repaid stated. Several years later formal claims were filed.

The court held that the letter of March 12, 1923, although unsworn, constituted an informal claim for refund under the circumstances, pointing out that it was filed after all of the taxes had been paid; that it made reference to the statute of limitations; that it was inended as a claim; that it stated the grounds; and that it put the Commissioner upon notice within the time he had authority to make refunds. Not having been rejected, it was subject to amendment notwithstanding the fact that the statute of limitations had run on filing claims.

(b) Under the circumstances in the case at bar, Paragraphs 9 and 10 of taxpayer's letter of March 23, 1925 constituted a present informal claim.

In view of all the circumstances surrounding the filing of her letter of March 23, 1925 with the Commissioner, i.e. the fact that it was filed after the tax here in question had been paid; that the Government had delayed until the statute of limitations was about to expire before making the jeopardy assessment based on a lower March 1, 1913 value than that fixed by Commissioner Roper; that the correct March 1, 1913 value was not at that time known and it was impossible for taxpayer to fix in dollars and cents the amount of the overpayment which had previously been made to Collector Grogan in the short time in which she had to act, we submit that paragraphs 9 and 10 of said letter constituted an informal claim for refund.

Judged by the results which it accomplished, it was clearly the equivalent of a formal claim, for it resulted in hearings on the merits, numerous conferences with the Bureau's General Counsel and was finally disposed of on the alleged legal grounds that it had been merged in a prior judgment against Collector Woodworth. In view of the practical construction placed upon this letter by the parties themselves, we submit that the construction placed upon it by the court below should stand.

This is warranted when the entire letter is considered. Paragraphs 1 to 8 set forth certain reasons for protesting against the payment of the $2,627,309.05 jeopardy assessment being made simultaneously. These paragraphs could not constitute a claim for refund, informal or otherwise, for that amount, since refund claims cannot be made until after the tax in question has been paid. *Kings County Savings Institution v. Blair*, 116 U. S. 200, 205; *Rock Island, Arkansas & Louisiana R. R. Co. v. United States*, 254 U. S. 141. Taxpayer, recognizing this principle, properly stated

in the closing paragraph that she "will make claim for the refund of the deficiency tax herewith paid," and thereafter did so.

Paragraphs 9 and 10 unlike the preceding eight paragraphs dealt, however, with the original tax which had been overpaid nearly five years before, although at the time the letter was written, the exact amount of overpayment was unknown since the true March 1, 1913 value of the Ford Motor Company stock had not been fixed. Paragraph 9 commences "this taxpayer further advises you and the Commissioner of Internal Revenue and the United States Government" etc., thus indicating that a different and distinct issue was being raised. If the paragraph was merely intended to supplement the protest to the Collector contained in the preceding eight paragraphs, there would have been no occasion for giving notice to the Commissioner or to the United States.

Paragraphs 9 and 10 do have this bearing upon the validity of the jeopardy assessment which was being presently protested. If, as taxpayer set forth in these paragraphs, the March 1, 1913 value was higher than Commissioner Roper's valuation of $9,489.34 per share and she had already overpaid the amount of her 1919 income taxes, it would follow that the jeopardy assessment was therefore illegal, irrespective of whether the Commissioner had authority to make it. These paragraphs therefore constituted a present assertion based on taxpayer's existing rights.

Paragraphs 9 and 10 differ in some respects. In Paragraph 10 taxpayer advised the Commissioner that "if for any reason a revaluation shall be had protestant will insist that said stock as valued by the Department as aforesaid was grossly undervalued and that she was required to and did pay an excessive tax upon an alleged excessive profit arising from said sale and she will claim the right to a

refund of said tax to the extent of such excess." Taxpayer relied on this paragraph in her amendment of Sept. 24, 1928.

Paragraph 9, on the contrary, deals with the situation in the event the Department, Board of Tax Appeals or any court should hold that the former assessment made by Commissioner Roper should be set aside and vacated and that the March 1, 1913 value of the Ford Motor Company stock as fixed by him should be "vacated, set aside, reopened or reversed and the contentions of this taxpayer as heretofore set forth be overruled."

Paragraph 9, however, clearly states taxpayer's contention that the $9,489.34 March 1, 1913 value of the Ford Motor Company stock fixed by Commissioner Roper was substantially less than the fair market value on the basic date, that the stock was greatly undervalued, that the fair value of the stock as of March 1, 1913 was greatly in excess of $9,489.34, and that therefore taxpayer should recover from the Collector of Internal Revenue or from the United States the portion of the tax theretofore paid as may be found to be excessive when the fair value as of March 1, 1913 shall have been determined.

Paragraph 10 also states as grounds for the prior overpayment, the fact that the stock was grossly undervalued and that the taxpayer "was required to and did pay an excessive tax upon an alleged excessive profit arising from said sale."

We submit, therefore, that these paragraphs were not a "vague alternative suggestion" as argued on page 21 of the Government's brief; that the letter could qualify as a claim for refund of the taxes here involved and not as a claim for refund of the deficiency itself since the two payments were separate and the letter was filed after the payment of the original tax but simultaneously with the payment of the deficiency tax.

Counsel for the Government also argue on page 21 that the use of language, conditional and couched in the future tense, amounts to no more than a warning that taxpayer might file a claim in the future. The courts, however, have frequently held that the use of the future tense with reference to past events is no legal impediment to the assertion of a present claim, and is more grammatical than substantial in a legal sense (see infra, pages 30 and 31).

It was only natural that taxpayer should employ the future tense in these paragraphs. When the March 23, 1925 letter was written taxpayer could not fix the true March 1, 1913 value of the Ford Motor Company stock, and thus determine in dollars and cents the exact amount of the refund due her. The use of the future tense was in contemplation of the making of a subsequent formal amendment to taxpayer's informal claim.

The Government is in no position to complain. It had itself fixed the March 1, 1913 value prior to the sale of taxpayer's stock in 1919 and taxpayer had no occasion to obtain any data with which to fix the March 1, 1913 value at any time prior to the making of the jeopardy assessment in March 1925.

Between the date of the jeopardy assessment and the expiration of the statute of limitations there was no time to do this. The valuation of the Ford stock presented a very complicated problem. It required the opinion of experts, accountants, engineers, economists, statisticians and bankers. The stock was unlisted and there were no sales as of the basic date. To determine its March 1, 1913 value, data regarding its earnings, its tangible and intangible property, the position of the Ford Motor Company in the automotive industry, the business risks then existing, etc., would have been necessary. The magnitude of the task will be appreciated by reference to the Board's findings of facts and the

voluminous record in *James Couzens*, 11 B.T.A. 1040. The Government, on page 16 of its Petition for Certiorari in the case at bar, gave this as a reason for granting the writ.

It should also be borne in mind that when Mrs. Kales' letter of March 23, 1925 was written, deficiencies had been assessed against other Ford stockholders amounting to almost $31,000,000 (*James Couzens*, 11 B.T.A. 1040, 1044). It is a matter of judicial record that on March 23, 1925 representative of the Philip Gray Estate (Mrs. Kales' deceased brother) filed a claim of abatement alleging that the $9,489.34 March 1, 1913 value of the Ford Motor Company stock "was not excessive but was less than the fair and actual value of said stock on that date." *Goodenough v. United States*, 19 F. Supp. 254 (Court of Claims Finding No. 13 page 257). It could therefore be reasonably expected on March 23, 1925, that some of the other Ford stockholders would apply to the Board of Tax Appeals or some other tribunal, open up the whole question of the March 1, 1913 value of the Ford stock, and obtain a final determination of that value.

Mrs. Kales decided, however, upon the procedure of paying the jeopardy assessment and bringing suit against Collector Woodworth for its recovery. The entire jeopardy asessment could be recovered in such a suit merely upon proof that the March 1, 1913 value of the Ford Motor Company stock was at least equal to $9,489.34 per share. The question of a higher valuation would not be directly in issue since no part of the tax overpaid to Collector Grogan could have been recovered in the suit against Collector Woodworth.

Under such circumstances, it was but natural that, instead of stating in her letter of March 23, 1925, an arbitrary value, or at least one which would have necessarily been only her opinion, Mrs. Kales should preserve her rights by the general assertion that she had already overpaid her

1919 income taxes and was entitled to a refund, and then wait until the March 1, 1913 value had been fixed by some tribunal of competent jurisdiction, before advising the Commissioner of the exact amount of the excess payment. We have previously pointed out that a demand for the refund of a specific sum is not necessary, especially when the nature of the transaction is such that it could not have been made at the time the claim had to be filed. See *Lasher v. United States*, supra, page 19.

Moreover, the case at bar differs from all other cases that have come to our attention in that the crucial question of fact, to-wit, the March 1, 1913 value of the Ford Motor Company stock, was one on which the Government had more information than the taxpayer.

The question had come up repeatedly in the Commissioner's office during the period 1919 to 1925. Commissioner Roper originally determined the March 1, 1913 value on May 19, 1919, to be $9,489.34 per share (Amended Petition 3(b), R. 8) after sending Talbert, Acting Deputy Commissioner, and four assistants to Detroit to check the books of the Ford Motor Company and to examine into its affairs for the express purpose of ascertaining the March 1, 1913 value of its stock. The mass of evidence then obtained is set forth in the *James Couzens* case, 11 B.T.A. 1040, at pages 1047 to 1053. The question was reconsidered during 1922 (11 B.T.A. 1066 to 1071) and again in March, 1925 (11 B.T.A. 1083). He was still investigating when he made the $2,627,309.05 jeopardy assessment against taxpayer (R. 30) based on a March 1, 1913 value of $2,534.00 per share.

Subsequent to the filing of taxpayer's letter of March 23, 1925, the Commissioner fixed the March 1, 1913 value at $3,547.84. *James Couzens*, 11 B.T.A. at 1092; *Woodworth v. Kales*, 26 F. (2d) 178, 179 (Note No. 2). He must have known that since a revision of the $9,489.34 Roper valuation

downward resulted in a deficiency, any upward revision would fix the amount of an overassessment, and this, of course, happened.

As pointed out by the court in *Woodworth v. Kales*, 26 F. (2d) 178, 179 (Note No. 2), the various March 1, 1913 values of the Ford Motor Company stock employed by the Commissioner were determined by the use of formulas and that "obviously the result can be varied at the pleasure of the inventor of formulas." The Commissioner must have been aware of the possibility that a different formula might be used, which would result in a valuation higher than $9,489.34 per share originally determined.

Under the foregoing circumstances, taxpayer was faced with a practical exigency when her letter of March 23, 1925 was prepared and filed; that nothing was then settled as to the March 1, 1913 value of the Ford Motor Company stock. Paragraphs 9 and 10 of said letter should, therefore, be construed in a practical manner and as constituting the assertion of a present claim.

Such a construction is in accordance with the practical interpretation placed upon the letter by both parties continuously since it was filed, and under the principle of the *Bowcit Teller & Company* case, supra, page 18, it is sufficient as an informal claim since it was understood and treated as such by the Commissioner.

Taxpayer considered her letter to include a claim for refund for in filing her amended claim on Form 843 she captioned it "Amendment to Claim for Refund Filed March 24, 1925" and expressly set forth Paragraph 10 of the letter as constituting the original claim. She caused a copy of the letter to be filed with the Commissioner which was entirely unnecessary if taxpayer had believed that she was merely protesting the payment of the jeopardy assessment. Furthermore, Paragraph 10 shows

that taxpayer was aware of the statute of limitations. It was imperative that a claim be filed or her right to a refund would soon be barred and there was no object in delaying the filing of an original claim until some future time.

The Commissioner also understood the letter of March 23, 1925, to constitute a refund claim and treated it as such. Allegations in the amended petition must be accepted as true on a motion to dismiss. *United States v. City Savings Bank & Trust Co.*, 73 F. (2d) 486 (C. C. A. 6th). In paragraph 3 (n) of the amended Petition (R. 12) it is alleged that

> "The Bureau, through its General Counsel and its officers and agents, had always treated said amendment and the refund claim of March 24, 1925, as claims from the time they were filed."

If the Commissioner had not considered the letter as a sufficient informal claim, it would seem logical that he would have promptly disposed of the refund on that ground and on the grounds of the statute of limitations. The Amended Petition shows, however, that after some six years of consideration, the Commissioner finally took the position in his letter of August 20, 1935 (R. 25-26) that "*the refund claim filed in 1925* was merged into the judgment secured by you." Attention is also specifically called to page 29 of the record where it appears that at the hearing on the merits held on June 13, 1929, the General Counsel "stated that they were satisfied that said protest was sufficient to constitute an informal claim for refund and that it was filed within the statutory period," and that thereafter, on June 21, 1929, a supplemental brief was filed expressly calling attention to these admissions. Furthermore (R. 30) a member of the General Counsel's staff even went so far as to recommend that the claim for refund be allowed.

(c) The use of the future tense in Paragraphs 9 and 10 of said letter was at most a grammatical defect. The letter was more than a warning that taxpayer might file a claim in the future.

It is well settled that a present claim can be made even though the word "will" is employed, particularly when the party to whom the claim is made already has some knowledge of the facts on which it is based.

Thus in *Georgia, Florida & Alabama Ry. Co. v. Blish Milling Co.*, 241 U. S. 190, a shipment of flour had been damaged in transit and one of the defenses pleaded was that no claim for damages had been made within four months after delivery as required by the bill of lading. The lower court held that no claim had been filed. The shipper had, however, sent a telegram within the four-month period, stating "*We will make claim* against railroad * * *."

After holding that the provisions in the bill of lading were valid and could not be waived by the carrier, the Court held that the telegram constituted a claim. It said on pages 197-198:

> "But, while this is so, we think that the plaintiff in error is not entitled to succeed in its ultimate contention under the stipulation *for the reason that it appears that notice of the claim was in fact given. It is true that in the statement made by the Court of Appeals it is said that so far as appears from the record 'no claim was filed by the shipper.'* We must assume, however, that this was in effect a construction of the provision as requiring a more formal notice than that which was actually sent. For the court had already set forth the uncontroverted fac[illegible] in detail showing that the shipper (having mad[illegible] investigation in response to the communication of the traffic manager of the Railway Company) had telegraphed to the latter on June 7, 1910, only five

days after the arrival of the goods at destination, as follows: '*We will make claim against railroad for entire contents of car at invoice price.* Must refuse shipment as we can not handle.' * * * Granting that the stipulation is applicable and valid, it does not require documents in a particular form. *It is addressed to a practical exigency and is to be construed in a practical way.*"

In *E. H. Emery & Co. v. Wabash R. Co.*, 183 Ia. 687, 166 N. W. 600, various shipments of strawberries had been damaged. The bill of lading required claims to be made within four months after delivery, non-compliance with which was pleaded as a defense. As to one shipment, plaintiff had written as follows:

> "Agent Wabash, City—Dear Sir: This is to notify you that, in due time, *we will file a claim against your company for damages* * * *."

As to another shipment, plaintiff wrote:

> "Agent Wabash, City—Dear Sir: This is to advise you that *we will file claim* against your company for damages * * *."

As to another shipment, plaintiff wrote:

> "Agent Wabash, City—Dear Sir: This letter is to notify you that *there will be a claim filed* for insufficient icing and poor refrigeration on car berries A. R. T. 9068, arriving at 2:45 p. m., May 22, 1913. * * * *In due time we will file a claim* against your road as the delivering line."

No other claim in writing was presented within the four-month period. The Court said:

> "It will be noted that the written notices or letters delivered to the agent by the plaintiff spoke in the future tense. Two of them stated that claim will be filed 'in due time'. *The argument for the appellee is concentrated largely upon this feature of the form of the notice, in that it indicated a purpose to file*

in the future a more formal claim, and that it thereby indicated that the plaintiff itself did not deem the writing as a sufficient compliance with the requirements of the B/L. The plaintiff did later in each case file a somewhat more formal claim, but not within four months. This argument necessarily assumes that the claim made might have been sufficient if it had spoken in the present tense. *We are impressed that such distinction is more grammatical than substantial in a legal sense.* The B/L specified no details as to the form in which a claim should be made. • • • We are relieved, however, from the necessity of passing upon the question as an original one. We deem the question here presented as having been clearly determined by the United States Suprme Ccurt in *Georgia Railway Co. v. Blish Milling Co.*, 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948. • • •

"In that case as in this the telegram spoke in the future tense. The amount of damages was not specified. No more formal claim than the telegram was made within four months. • • •

"• • • We hold, therefore, that the requirement of the B/L relating to the method and time of making claim for damages was sufficiently complied with."

Similar rules are laid down in *Fisk Rubber Co. v. New York, N. H. & H. R. R.*, 240 Mass. 40, 132 N. E. 714; *New Orleans & N. E. R. Co. v. Wood*, 112 Miss. 614, 73 So. 615; *Cudahy Packing Co. v. Bixby*, 199 Mo. App. 589, 205 S. W. 865 (certiorari denied 248 U. S. 577); *Stiles v. Ocean S. S. Co.*, 34 F. (2d) 627 (C. C. A. 2). See also *The West Arrow*, 80 F. (2d) 853 (C. C. A. 2), where letters containing among others, the phrase "The parties interested *will hold* the steamer responsible for the damage", were held definite enough as a declaration demanding payment, although the amount claimed could not be supplied at the time because it was unknown.

In *George Moore Ice Cream Co., Inc., v. Rose*, 289 U. S. 373, the Circuit Court of Appeals for the Fifth Circuit was reversed. As appears from the lower court's opinion, 61 F. (2d) 605, a claim was filed on the last day before the statute expired. It gave notice of specific errors in adjustment of invested capital and also stated there had been an erroneous assessment of net income. It included a statement that "*if* the audit now being made reflects a different result *it will be submitted* as additional *evidence*." After the statute of limitations had run, detailed statements were filed as amendments. The Circuit Court of Appeals held that this statement did not indicate a purpose to challenge the exacted tax on a ground other than the one based on the elimination of assets from taxpayer's invested capital. This Court, however, held at page 384, that the notice as to the erroneous assessment of net income was subject to amendment. This conclusion would seem to clearly justify the filing of the September 24, 1928, amendment in the case at bar so as to include matters which were still under investigation by the Commissioner at the time the statute of limitations expired.

We submit, therefore, that counsel have reached an unwarranted conclusion on page 22 of their brief that the statements with reference to the original tax are no more significant or operative as a claim than those made in regard to the additional tax, and that taxpayer failed to file any claim for refund of the original tax until 1928.

On page 23 of the Government's brief, certain cases are cited for the proposition that a protest with a notice that a refund will be sought or a statement of intention to file a claim has always been considered not to constitute a "claim" which would satisfy the statutory requirement. They are all distinguishable from the case at bar.

Art Metal Construction Co. v. United States, 47 F. (2d) 558 (C. C. A. 2), did not involve the sufficiency of any let-

ter as constituting an informal claim. There the taxpayer filed a formal claim without stating any grounds. In the sentence following the first part of the quotation cited on page 23 of the Government's brief, the Court pointed out a distinction which applies to the case at bar. The Court said at page 559:

> "The supposed claim was no claim at all; it was a mere caveat, an attempt to reserve the taxpayer's right at some later time to file a claim, should something turn up, either because of a change in the rulings of the courts, or of the Department, or for any other reason which might lead him to suppose that he could get back what he had already paid. *We are not therefore dealing with a claim ineffectually couched, which advised the Commissioner that the taxpayer had come to doubt the validity of any part of the tax. In such cases we may assume arguendo that much latitude would be allowed,* not only to amend as to the amount demanded, but to amplify the grounds of the claims, and perhaps to set out others."

In the case at bar, taxpayer's letter of March 23, 1925 certainly went much farther than to advise "the Commissioner that the taxpayer had come to doubt the validity of any part of the tax." We submit that the *Art Metal Construction Co.* case is authority in support of taxpayer's contentions that her letter was a sufficient informal claim for refund.

Ordway v. United States, 37 F. (2d) 19 (C. C. A. 2), also, we submit, is an authority in favor of the present taxpayer. There certain unpaid attorney fees had been disallowed as a deduction and a letter was written to the Commissioner expressing an intention of filing a claim for refund for estate taxes after the fees had been allowed and paid. At the date the letter was written, no claim had in fact come into being, so that the letter could not possibly constitute

a claim for refund. The Court pointed out that if a claim had arisen at the time of the letter, it might overlook all defects. It said at *page 21:*

> "The letter of October 3, 1921, cannot be treated as the presentation of a claim to the commissioner. *If the only difficulty had been lack of proper form, or if any claim had at that time arisen, we might overlook all defects.* But the letter of October 3, 1921, was no more than a statement of the plaintiff's position and a forecast of what he proposed to do when his claim should come into being. It did not present or even purport to present a claim, and, indeed, it could not do so, for no claim then existed."

In the case at bar, taxpayer's claim had in fact arisen long prior to the letter of March 23, 1925.

Dysart v. United States, 95 F. (2d) 652 (C. C. A. 8), presented a similar question to that in the *Ordway* case and is distinguishable on other grounds as well. There taxpayer's final and untimely claim for refund presented the new theory, to-wit, that an estate was entitled to the deduction of the amount of statutory executor's fee in the amount of $37,557.60 which might have been allowed, whereas the amount actually allowed and paid was only $7,500. In connection with timely claims on other items the taxpayer had reserved the right to file further claim when the amount of the commissions had been determined and paid. As the Court stated on page 654 of its opinion, it was not required to pass upon the question of whether the prior notice tolled the time for filing a claim for refund for the amount actually allowed and paid until the amount of the fees was subsequently paid. The claim before the Court was not of that character. The case is not applicable to the case at bar, since Mrs. Kales did not shift to new grounds in the amendment to her original informal claim.

In *Semmes Motor Co. v. United States*, 67 Court of Claims 631, the taxpayer filed a protest against a proposed assessment of additional taxes, but, as the court pointed out, neither in express terms nor by implication did the plaintiff assert any claim for refund. This, of course, is not true of Mrs. Kales' letter.

In *Mutual Trust Life Insurance Co. v. United States*, 45 F. (2d) 288 (Court of Claims), it appeared that the taxpayer inserted a protest by way of indorsement upon the face of its income tax return, and, in paying the tax shown by the return, wrote to the Collector protesting the payment of a portion of it. Such a letter of protest could not be considered a claim for the reason that payment is a necessary precedent to the making of a claim. In Mrs. Kales' case, paragraphs 9 and 10 of her letter of March 23, 1925, referred to the tax paid on her original return some five years before and had no reference to the jeopardy assessment which was being paid simultaneously with the filing of the letter. We see nothing in the decision of the above case which is in any way applicable to the case at bar.

In *Heberlein Patent Corporation v. United States* (D. Ct. S. D. N. Y. not officially reported) U. S. T. C. 38-1, par. 9182, the letter in question was merely a protest against the accompanying payment of additional 1926 and 1927 income taxes then being made to the Collector. It did not refer to payments made in a prior year, and hence could not be construed as a claim. Furthermore, it was clear that the taxpayer did not treat the letter as a claim for, unlike the case at bar, the formal claims, which were thereafter filed on January 24, 1931, were drawn as original claims and not as amendments to the letter, which was not referred to. In addition, it appears from the opinion that the claims referred to in the letter, as well as the 1931 formal claims, were allowed July 16, 1931. The suit was apparently brought on new grounds asserted in new claims filed in 1932 and 1933 as amendments to the 1931 claim.

The Court was clearly correct in holding that after a claim has been allowed in full it was no longer subject to amendment.

Waters v. United States, 12 F. Supp. 658 (W. D. Mich.) (affirmed per curiam C. C. A. 6), is distinguishable on several grounds. The trial court expressly found that there was no evidence that either the taxpayer or the Commissioner regarded the letter as other than a statement of intention to file a claim; the letter read: "I intend to file claims for refund" but stated no grounds, whereas paragraph 10 of the letter in the case at bar read "She will claim the right to a refund" and the reasons were given. Furthermore, the Court's opinion indicates that Waters' tax was paid simultaneously with the filing of the letter with the Collector and not before, and hence the letter could not have been characterized as a refund claim.

On pages 24 and 25 of the Government's brief, a large number of cases are cited in support of the argument that the decision in the case at bar constituted a departure from established principles. On examination it will be readily seen that they are all easily distinguishable.

In *United States v. Felt & Tarrant Co.*, 283 U. S. 269, the deduction claimed in the suit was not mentioned in the claim for refund, nor in the brief or at the hearing before the Commissioner. This is not true in the case at bar.

In *United States v. Henry Prentiss & Co., Inc.*, 288 U. S. 73, the amendment was not responsive to the original request for a special assessment. In the case at bar the amendment did not depart from the original grounds stated in support of the refund.

Counsel cite *United States v. Mellon*, 39 F. (2d) 505 and on page 25 of their brief state that a so-called "claim" even though on Form 843 did not satisfy the statutory requirement" etc. This reference to Form 843 coupled

with the prior argument on page 19 of their brief tha refund claims were required to be filed on this same forn is misleading. Counsel omit to state that claims of abate ment are likewise filed on Form 843, and that in the *Mello* case the so-called claim which the taxpayer filed was, a the Bureau's suggestion, a claim of abatement to sta collection of an asserted deficiency. Claims of abatemer are not refund claims. *Rock Island & R. R. v. Unite States*, 254 U. S. 141, cited at page 12 of the Government brief. No facts or grounds were stated in the claim c abatement and the fact of overpayment was not discovere until several years thereafter. It was then asserted tha the abatement claim was a refund claim and mandamu was brought to compel payment, which the court refuse to grant. The court held that it was for the Commissione to determine whether an alleged claim of refund complie with the statutory requirements and "whether the cou would have reached the same conclusion is not the que tion." The case at bar constitutes no departure fro any established principles of the *Mellon case*. Since th Commissioner treated the letter in the case at bar as claim, the *Mellon* case would seem to be an authority support of the Court below instead of against it.

In *United Shoe Machinery Corp. v. White*, 89 F. (2d 363 (C. C. A. 1), there was no claim for refund, eith formal or informal. The District Court held a claim fo credit was not a claim for refund, 13 F. Supp. 97. *M Laughlin v. Dean Witter & Co.*, 69 Fed. (2d) 259, holdin that a closing agreement was not a claim, is not in poi since the case at bar does not involve closing agreemen

Certain letters were construed in *Livermore v. Miller*, F. (2d) 111; *Anderson v. United States*, 6 F. Supp. 85 *Pine Hill Crystal Spring Water Co. v. United States*, 58 (2d) 506; *International Arms and Fuze Co. v. Unit States*, 37 F. (2d) 771; *Philipsborn v. United States*, 53

(2d) 133; *Northwestern Natl. Life Insurance Co. v. Willcuts*, 1931 C. C. H. Vol. 3, Par. 9336; *Pratt & Letchworth Co. v. United States*, 1 F. Supp. 745; and *Peterson v. United States* (E. D. Okla.), U. S. Tax Cases 1939-2 at Par. 9521, but they all involved a different factual situation than is present in the instant case.

Thus in *Livermore v. Miller* the purpose of the correspondence with the Collector was to explain taxpayer's refusal to pay installments due on current taxes and not to claim a refund. It was not, in fact, presented to the Commissioner or considered to be a claim by the Collector. The letter in *Anderson v. United States* was likewise written to avoid payment of a proposed deficiency and the Court found that the taxpayer did not expect a refund. In *Pine Hill Crystal Spring Water Co. v. United States* the letter was merely a request for a ruling and obviously was not a claim. In *International Arms and Fuze Co. v. United States*, the letter referred to 1917 taxes, whereas suit was brought for 1916 taxes. In *Philipsborn v. United States*, the letter was not considered as a claim by either taxpayer or the Commissioner and besides contained no assertion of an overpayment or of errors in computation. The letter in *Northwestern Nat. Life Ins. Co. v. Willcuts* does not appear in the opinion, but apparently it was only a letter of protest accompanying the payment in question. In *Pratt & Letchworth Co. v. United States*, the letter which was said to amend the claim was not shown to have been accepted and considered, whereas the letter in the case at bar was accepted and treated as a claim. In *Peterson v. United States*, the letter was insufficient as an informal claim because it did not even make a statement that overpayments had been made. Hence it was treated as a letter of protest.

On page 26 of its Brief the Government argues that the Court below treated the letter as a contingent claim which

completely suspended the statute of limitations until some future date. There is no discussion in the Court's opinion, however, about any tolling of the statute of limitations. The Court below stated the issue to be "whether appellant's letter of March 24, 1925, to the Collector of Internal Revenue constituted an informal claim for refund" (R. 45) and concluded (R. 47) that the "letter was more than a protest or a statement of an intention to file a claim later in the event certain contingencies should arise." What was no doubt meant by the statement that the claim "did not mature until the March 1, 1913 value of the stock as previously determined by the Commissioner was changed by his office, the Board of Tax Appeals or some court of competent jurisdiction" was that the amount of the overpayment in dollars and cents could not be fixed until that time.

The decision below is not such a precedent as would permit taxpayers to suspend the statute of limitations as suggested on pages 26 and 27 of the Government's brief.

The use of informal claims was abolished in 1929 by T. D. 4266, VIII-1 Cum. Bull. 111 (Appendix, page 71) so that the Commissioner cannot now "be forced to consider at his peril every informal assertion to him by a taxpayer." If claims are filed stating that pertinent information depending upon the result of pending audits or litigation will be submitted in the future, then the Commissioner has the remedy in his own hands of promptly disallowing the claim if he wishes to start running the statute of limitations on commencing suit. See *United States v. Memphis Cotton Oil Co.*, 288 U. S. 62, 71.

Nor, as is suggested in the foot note page 27 of the Government's brief, would there have been no necessity, if the decision below is correct, for the enactment of Section 608 (b) (2) of the 1928 Act. The time for starting suit in the case at bar was extended by reason of the Commis-

sioner's failure to reject the claim and not because of its alleged contingency. Section 608 (b) (2) of the 1928 Act is perhaps necessary to take care of cases in which claims have been rejected, since once the claim had been rejected, there was formerly no legal means of postponing the time for starting suit, even if both the Commissioner and the taxpayer were willing.

On page 27, the Government finally argues that in any event the contingency referred to in the letter never arose. It should be noted that the various excerpts quoted are all taken from Paragraph 9 of taxpayer's letter and the discussion is only appropriate to that paragraph. Paragraph 10 dealt with the situation where "for any reason a revaluation shall be had" and this occurred when the Board promulgated its opinion in the *Couzens* case.

We do not understand counsel to question the right to amend on September 24, 1928, if it is held that the letter of March 24, 1925 constituted an informal claim for refund. This was expressly permitted by T. D. 4266 VIII-1 Cum. Bull. 111 promulgated March 27, 1929 (Appendix page 71). The amendment clearly comes within the rules laid down in *United States v. Memphis Cotton Oil Co.*, 288 U. S. 62 and *United States v. Factors' & Finance Co.*, 288 U. S. 89.

II.

By retaining and treating the letter of March 23, 1925, as a claim for refund for a period of over ten years, the Commissioner waived any and all defects of form contained therein.

The Commissioner is, of course, without power to waive the bar of the statute of limitations, *United States v. Garbutt Oil Co.*, 302 U. S. 528, any more than a railroad can waive the requirements of a bill of lading for the filing

of claims for damages. *Georgia, Florida & Alabama Railway Company v. Blish Milling Company*, 241 U. S. 190.

He can, however, waive the requirements of the regulations as to the particularity with which the grounds must be stated and consider a general claim on its merits. *United States v. Garbutt Oil Co.*, 302 U. S. 528, 533.

In *Tucker v. Alexander, Collector*, 275 U. S. 228, a claim was filed on certain grounds, but on trial they were abandoned and without objection a new issue was litigated. The Circuit Court of Appeals held that a recovery on new grounds was prohibited by Section 3226 Revised Statutes. In reversing, this Court said at page 231:

> "*The statute and the regulations* must be read in the light of their purpose. *They are devised, not as traps for the unwary, but for the convenience of government officials* in passing upon claims for refund and in preparing for trial. Failure to observe them does not necessarily preclude recovery * * *. If the Commissioner is not deceived or misled by the failure to describe accurately the claim, as obviously he was not here, it may be more convenient for the government, and decidedly in the interest of an orderly administration procedure, that the claim should be disposed of upon its merits on a first trial without imposing upon government and taxpayer the necessity of further legal proceedings. *We can perceive no valid reason why the requirements of the regulations may not be waived for that purpose.*"

See also *United States v. Elgin National Watch Co.*, 66 F. (2d) 344 (C. C. A. 7th); *United States v. Humble Oil & Refining Co.*, 69 F. (2d) 214 (C. C. A. 5th); *Reynolds v. McMurray*, 77 F. (2d) 740 (C. C. A. 10th).

The Commissioner was not misled by the generality of Mrs. Kales' letter of March 23, 1925 (Affidavit, R. 31), and in none of the exhibits attached to the amended peti-

tion does it appear that objection was ever made on that score.

The Commissioner must therefore be deemed to have waived all defects arising from the noncompliance with the regulations in respect to the original claim of March 23, 1925.

III.

Taxpayer's claim for refund was never rejected and suit is not barred by Section 3226 of the Revised Statutes.

It was claimed in the motion to dismiss (R. 26) that uit was barred by Section 3226 of the Revised Statutes and error is assigned to the failure of the court below to hold that the cause of action was barred by the statute of limitations (Error No. 7, Government's Brief, page 9).

We do not understand the Government is now claiming that if taxpayer's letter of March 23, 1925, is held to be an informal claim thereafter duly amended, that there is any applicable statute of limitations that bars the suit.

Under Section 3226 of the Revised Statutes as amended by Sections 1103 of the Revenue Act of 1932 and 807 of the Revenue Act of 1936 (Appendix page 70), the time limit on starting suit is two years from the date of mailing by registered mail of notice of the disallowance of the part of the claim to which the suit relates.

No error was assigned to the Circuit Court of Appeals' decision that the Commissioner's letter of April 6, 1925, did not constitute a rejection (R. 49) and the Government does not argue the point.

It was specifically alleged in paragraph 3(n) of the amended petition (R. 12) that no notice of the disallowance of the claim had been mailed to taxpayer by registered mail, and as late as August 20, 1935, the Bureau took the

position that there was no necessity for a disallowance (R. 25, 26). Even if the letter of August 20, 1935, was considered by the court to be a rejection, the present suit was timely, being brought less than a year thereafter.

It is clear therefore, that the present suit is not barred by Section 3226 of the Revised Statutes.

IV.

There was no merger of the tapayer's refund claim involved in this suit into the judgment granted taxpayer on the jeopardy assessment.

The Government argues that the taxpayer's claim for refund of $195,710.44 is merged in the judgment secured by the taxpayer against Collector Woodworth on the jeopardy assessment of $2,627,309.05.

The rule of "merger" as here invoked is a branch of the res judicata and its application is to be tested by the same rules as apply to that doctrine. It might well be left to our later consideration of res judicata. It is, however, covered under a separate heading in the Government's brief and we therefore discuss it here. It should be noted, however, that this point was raised by the Government in its motion to dismiss (R. 27) but was thereafter abandoned. It was not pressed in the Circuit Court of Appeals. That Court said (R. 49):

> "The Internal Revenue Bureau accepted appellant's amendment to her informal claim and considered it on its merits and finally rejected it *on a ground abandoned* in this action * * *." (Italics ours.)

The general rule is that objections not raised in the lower court cannot be relied upon in the appellate court. *Federal Trade Com. v. Pacific States Paper Trade Assn.*, 273 U. S. 52.

Hiawassee Power Co. v. Carolina-Tenn. Co., 252 U. S. 341;
Duignan v. United States, 274 U. S. 195;
Blair Commr. v. Oesterlein Machine Co., 275 U. S. 220;
Helvering v. Minnesota Tea Co., 296 U. S. 378;
Helvering v. Tex-Penn Co., 300 U. S. 481;
Burnet Commr. v. Commonwealth Imp. Co., 287 U. S. 415;

and particularly *Helvering v. Wood*, 309 U. S. 344, 348-349, where, as here, the point had been expressly waived in the Circuit Court of Appeals.

The question of merger was first raised by the Commissioner in his letter of August 20, 1935 (R. 25). That letter proceeds on the assumption that the informal refund claim which was filed March 24, 1925 to recover an overpayment in 1920 of taxes on account of under-valuation, and which claim was amplified and perfected by the amendment of September 24, 1928, is the same refund claim which was filed June 4, 1925 to recover the jeopardy assessment of $2,627,309.05. The letter also proceeds on the assumption that the informal claim filed March 24, 1925 for the 1920 overpayment was merged in the judgment rendered for $2,627,309.05 on the jeopardy assessment claim filed June 4, 1925. Both assumptions are clearly erroneous. The claim for refund, on which the pending suit is based, was filed March 24, 1925, and amplified and perfected by the amendment of September 24, 1928, and is a separate claim and involves a separate issue from that involved in the suit against Collector Woodworth. The refund claim involved in the suit against Collector Woodworth was filed June 4, 1925.

Paragraphs 9 and 10 of the letter of March 23, 1925 clearly relate to something more than the jeopardy assessment of $2,627,309.05 with which the later suit against

Collector Woodworth was concerned. The objections to the levy of that jeopardy assessment had been particularly covered in the preceding Paragraphs 1 to 8. In Paragraph 9 the taxpayer goes further and says:

> "This taxpayer further advises you and the Commissioner of Internal Revenue and the United States Government that while it is her position that the deficiency assessment is so illegal and void as is set forth in Paragraphs 1 to 8 above, and is likewise illegal and void and contrary to law for other reasons, that if it should be held * * * that the former assessment as made by Commissioner Daniel C. Roper should be set aside and vacated * * * then this taxpayer will show and claim and insist that the valuation of $9,489.34 * * * is substantially less than the fair value of said stock on the basic date and that the said stock was clearly undervalued by the Commissioner and that the fair value of said stock per share as of March 1st, 1913 was greatly in excess of $9,489.34 and that, therefore, this taxpayer should recover * * * such portion of the tax heretofore paid on said transaction as may be found to have been excessive * * *."

And in Paragraph 10 the taxpayer definitely asserts her additional claim:

> "* * * yet if for any reason a revaluation shall be had protestant will insist that said stock as valued by the Department as aforesaid, was grossly undervalued * * * and she will claim the right to a refund of said tax to the extent of such excess."

In the preceding Paragraphs 1 to 8, the taxpayer asserted that, relying upon the original March 1, 1913 value fixed by Commissioner Roper, she had sold the stock and could not recover it; that the Roper valuation was fixed by the Government without consultation with the taxpayer; that the proposal of the Government was that if she would sell her stock, the Government would accept

payment of the taxes computed on Commissioner Roper's valuation and that that valuation must stand; the Government had no right to change it to the taxpayer's prejudice and was estopped from reopening it and assessing a deficiency based on a new and different valuation.

When, therefore, counsel asserts that it is clear from the context of the letter that taxpayer was concerned only with the deficiency assessment, he is in error. When he asserts (Br. 17) that the judgment in the jeopardy assessment suit against Collector Woodworth "gave the taxpayer everything she demanded in her letter of March 23, 1925" and again when he asserts at page 18 "that the judgment entered in the prior litigation was fully responsive to the March 23, 1925 letter," he entirely overlooks the fact that Paragraphs 9 and 10 were asserting a claim above and beyond the claim for the jeopardy assessment of $2,627,309.95; that is a claim for such an amount of the overpayment in the original tax of $1,216,086.26 which would automatically result if it should be judicially and finally determined that the fair market value of the Ford stock on March 1, 1913 was, in fact, greater than the $9,489.34 as fixed by Commissioner Roper.

There were then in this letter two separate demands. One was for the repayment of the jeopardy assessment paid to Commissioner Woodworth. The other was for the repayment of any excessive portion of the original tax which was paid to Commissioner Grogan in 1920, and which would be determined by a revaluation of the Ford stock. The suit against Collector Woodworth involved only the jeopardy assessment. No suit could be brought against Collector Woodworth for taxes that had been paid to Collector Grogan. *Smietanka v. Indiana Steel Co.*, 257 U. S. 1, decided October 24, 1921; *Union Trust Co. v. Wardell*, 258 U. S. 537, decided May 1, 1922. The Government properly concedes this on page 31 of its brief. It follows

that that there could be no merger of the claim against Collector Grogan in the judgment against Collector Woodworth. It is inconceivable that there could be merged in the judgment against Collector Woodworth a claim which could not be prosecuted against him. And, of course, the claim which could not be litigated in the suit against Collector Woodworth and was not there litigated would not be extinguished by a judgment against Collector Woodworth.

V.

The Taxpayer has not split a cause of action.

It is asserted that this suit and the suit against Collector Woodworth for the jeopardy assessment both involved the taxpayer's income tax liability for the year 1919 (Government's Brief, 28); that income tax liability for any one year constitutes a single cause of action; that that cause of action cannot be split and therefore the taxpayer here, having brought suit to recover the jeopardy assessment growing out of the 1919 income, cannot now bring suit asserting that she had originally over-paid the tax on that year's income.

This point has not heretofore been raised at any time in Court in the proceedings in the District or Circuit Court of Appeals. It was suggested for the first time in the petition for certiorari. We respectfully suggest that the Court should not permit the Government to now present it. It is closely related to the merger point which was abandoned in the Court below. See supra, page 43.

It is true that generally "a single cause of action or entire claim or demand cannot be split up or divided so as to make up the subject of different actions." But there are exceptions to this rule. Obviously, however, this rule cannot be applied where there is not a single indivisible claim or cause of action. Nor does this rule prevent successive ac-

tions as often as an independent cause of action arises which, because of its subsequent creation, could not be litigated in the former suit. The question is as to what constitutes an entire or single demand and the question presented on this record is whether or not the cause of action involved in this suit on a claim arising out of an overpayment of the taxpayer's income tax made in 1920 on her 1919 return is or is not a demand separate from her claim for a refund of the jeopardy assessment levied in 1925 which jeopardy assessment was an additional tax on the same 1919 income. Is taxpayer precluded from challenging any portion of her 1919 tax because she challenged the validity of the jeopardy assessment?

This rule against splitting demands stems from the general doctrine of res judicata. A judgment on the merits between the same parties is res judicata in a later suit on the same demand not only as to the precise claims that were litigated in the first suit but also as to other matters which were necessarily "incident to and growing out of that adjudication." It is true that it has been held that a tax liability for a given year is a single entity and so successive suits cannot be brought to recover separate items of a single year's liability. A year's income is said to be the indivisible entity on which the tax is computed. In certain of the cases so holding the decision rested on the fact that the claim in the second suit was identical with the claim adjudicated in the first suit. In the others it rested on the fact that the claim in the second suit was a matter that might have been properly submitted in the first suit. But this rule must yield to the qualification that the judgment in a prior suit is not a bar to any matter which could not with propriety have been litigated and determined in that prior action. None of the cases cited by counsel for the Government dispute this.

In *Lewis v. Reynolds*, 284 U. S. 281, this precise question was not involved. The court held that on a claim of refund

the question presented was whether the taxpayer had overpaid his tax. If on a redetermination of the entire tax liability, an additional tax was developed, even though it was after the bar of the statutes of limitations, and no new assessment could therefore be made, this additional liability would wipe out the amount of the refund. The taxpayer was not entitled to the refund unless he had in fact overpaid his tax. The decision went no further.

In *International Curtis Marine Turbine Co. v. United States*, 56 Fed. (2nd) 708 (Ct. of Claims), holding that a single cause of action could not be split up, the court found that the whole matter which was before the court in the second suit had been before the court in the first suit and, applying the doctrine of res judicata, the court denied the taxpayer relief.

In *American Woolen Company v. United States* (Court of Claims), 18 Fed. Supp. 783, there had been proceedings before the Board of Tax Appeals to determine plaintiff's taxes for 1922 and 1923 and the parties had filed a stipulation agreeing on the deficiency for 1922 and the overpayment for 1923. Later the taxpayer sought to recover the amount of the overpayment which the Board had applied as a credit. But the Court found that the stipulation was "such that it must be presumed that all matters in controversy between the parties with reference to the taxes of 1922 and 1923 were covered thereby and disposed of by the final order of the Board." And it applied the doctrine of res judicata. Judge Littleton, in concurring with the opinion, rested his concurrence on *Warner v. United States*, 15 F. Supp. 160 which held that a decision of the Board of Tax Appeals having before it "the precise issue involved in this case" was final.

In *Guettel v. United States*, 95 Fed. (2d) 229 (C. C. A. 8th, 1938), the taxpayer, having litigated the question of overpayment of an estate tax on the ground of the wrong-

ful inclusion of one item in the gross estate, was barred from recovering in a later case a claim based on the inclusion of another item. It was argued that the second claim was not raised in the first case because of lack of knowledge. The court held that this was no excuse and the rule of res judicata must apply.

In the case of *Chicago Junction Railways v. United States*, 10 Fed. Supp. 156 (Ct. of Claims, 1935) it appeared that the claim pressed in the later case was in fact a part of the claim that had been litigated in the previous suit and that the plaintiffs had been free to press it in that suit and had been in no way misled.

In *Bowe-Burke Mining Co. v. Willcuts*, 45 Fed. (2d) 394 (D. C. Minn., 1930) the suit was by the same plaintiff against the same defendant to recover the same taxes as had been litigated in the former suit.

In the case of *Western Maryland Railway Co. v. United States*, 23 Fed. Supp. 554 (D. C. Md., 1938), the first of the two suits was to recover the principal amount of the tax paid. The second suit was to recover interest that had accrued on the tax during the period that elapsed after it was declared payable and the time when it was in fact paid. The court said that the question was "essentially whether the doctrine of res judicata is applicable," and that the problem was two-fold; first, as to whether the present cause of action was separate and distinct from the first one in which judgment had been entered; and second, whether the parties were to be treated as not being the same, the defendant in the first suit having been the Collector and in the second suit, the United States. The court then proceeded to a consideration of whether the two claims were the same and concluded, on page 556, that:

> "the present claim for interest might well have been presented at that time, since the right to recover the interest here in controversy obviously depended up-

> on the right to recover the tax itself. Had a claim then been made, this Court could, and undoubtedly would, have entered judgment for this interest, as part of the complete refund to which the Railway Company would have been found to be entitled."

Bertelsen v. White, 58 Fed. (2nd) 792 (D. C. Mass., 1932) was a suit against a Collector to collect alleged overpayment of taxes for the year 1920. There had been a prior suit before the Court of Claims with respect to the 1920 tax. The Court said it was unable to see how that case could have been disposed of on its merits without the necessity of determining the validity of the 1920 tax and concluded, page 796, that:

> "the issue presented in the case at bar was included among the issues raised by the pleadings in the Court of Claims and the judgment was a final determination of these issues binding upon both parties to the action."

In all of these cases, therefore, the basis of the decision was the general doctrine of res judicata. In each case, it was found that the claim raised in the second suit had been litigated in the first suit. The fact that in any case both demands arose out of the tax liability of a single year was a circumstance that indicated that the claim pr sed in the later suit was decided in the earlier suit. But not one of these cases holds that if there should be separate causes of action arising out of the income tax liability for a single year, the doctrine as to splitting demands would apply if separate suits were brought on the separate claims. Nor do they hold that the fact that both cases arose out of the tax liability of a single year excludes entirely the possibility that the causes of action differed.

Two cases make it clear that different causes of action may arise out of a tax liability for a single year.

In *Old Colony Ry. Co. v. United States*, 27 F. (2d) 994 (D. C. Mass .1928) it was argued by the Government that a determination by the Board of Tax Appeals of the correct amount of a deficiency necessarily involved an inquiry into the total tax liability for the taxable period; that the income tax for any taxable period must be treated as an entirety and all questions as to it must be disposed of in one proceeding. But the Court held that it did not follow that a tax for a single year could be determined, assessed, collected or recovered in only one suit, pointing out that where different installments of a tax were paid to different collectors, one suit to recover the tax could not be brought.

In *Cambridge Loan & Building Co. v. United States* (Ct. of Claims, 1932), 57 F. (2d) 936, the taxpayer had been assessed a certain amount of tax plus interest and penalties. It paid the tax and interest but did not pay the penalties. It filed a claim for refund for the taxes and interest paid which was rejected with the exception of an amount which was the exact equivalent of the amount of penalties that had been assessed. The Commissioner's office, evidently confused, issued a certificate of over-assessment for that amount. The taxpayer then brought suit and recovered for the amount of its claim which had been rejected. Later it brought a suit for the additional amount for which the certificate of over-assessment had been issued. It was conceded that the taxpayer was entitled to the payment of the amount except for the fact that payment was barred because the matter had been litigated in the prior suit. The doctrine of res judicata was the only defense invoked. There was no question but that both claims grew out of the tax for the same year. The court held that the plaintiff could recover, pointing out that there was a distinct line of demarcation between allowed tax refund claims and rejected ones. It was pointed out that, as between the two, different statutes of limitations applied and the proofs that sus-

tained one were not in all respects of the same character essential to sustain the other. And so in spite of the fact that both claims grew out of the same year's tax, the court held that they were separate claims and that the actions were separate and the prior suit was not res judicata of the later one.

Are there in the present case two separate claims or two claims in which there are separate issues? We shall later advert in some detail to this question. Here we assert that there are certainly differences between the two claims. There is a difference of time. The taxpayer paid her original tax on her 1919 income in 1920. She paid the jeopardy assessment when it was levied in 1925.

But the issues under these two claims were entirely different and the proofs to establish them would be different. The issue in the suit on the jeopardy assessment was the power of the Commissioner to change the Roper valuation. That was the issue presented to the court. It was on that issue that the court decided that case. The issue in the present suit is entirely different. Plaintiff in the present suit asserts that the March 1, 1913 value was $10,000 a share and to prove that value offers the determination of the Board of Tax Appeals. Plaintiff's recovery in this suit turns upon the true March 1, 1913 value of the stock. In the absence of an acceptance by the Government of the finding of value as made by the Board of Tax Appeals, there would be an issue of fact as to that value presented. The suit on the jeopardy assessment challenged only that assessment. The determination as to its validity involved no recomputation of the original tax. The doctrine of the law which prohibits the splitting of a single indivisible demand has, therefore, no application here whatever. There is no single, indivisible demand. There are two separate demands.

It is argued on page 31 of the Government's brief that the fact that the dissatisfied taxpayer has three remedies

suggests that Congress could not have intended that more than one suit could be brought on a single year's taxes. We do not follow this reasoning. It would seem rather that the very fact that there are three remedies suggests not restrictions, but liberality. To the old remedy against the Collector there has been added the suit against the United States. Congress might take away the suit against the Collector. It did so as to a processing tax under the Agricultural Adjustment Act (*Anniston Mfg. Co. v. Davis*, 301 U. S. 337). But as to income tax collections, it still remains. Congress has added the review by the Board of Tax Appeals.

No inference can be drawn from the history and existence of these three remedies that Congress did not intend to permit a taxpayer to contest in different suits separate and distinct claims even though they spring from a single year's income tax provided only that the rule of res judicata so permits. The very variety of the remedies provided would indicate that no arbitrary restriction was intended to be imposed on the fullest opportunity for the taxpayer's contest.

It is in connection with this argument in respect to the splitting of a single cause of action that counsel for the Government concedes (Footnote, Brief p. 31) that the taxpayer was limited in her recovery against Collector Woodworth to the amount paid him. But he argues that "she should not be heard to complain that she elected to pursue the less desirable course." The inference is that if she selected the suit against the Collector in preference to a suit against the United States for a refund on the original tax, she cannot now dispute that the suit against the Collector is in fact a suit against the United States and she cannot now bring an additional suit against the United States.

This argument turns of course on the question as to whether the two suits do, in fact, involve the same demand. If there are separate demands in the two suits then she did not split her cause of action and did not take a "less desirable course" when she chose to sue Collector Woodworth for the jeopardy assessment of 1925. She still had her right to sue the United States for the overpayment in 1920.

There were very practical reasons why she should pursue her remedy against the Collector on the jeopardy assessment and await the determination of the Board of Tax Appeals on the March 1st, 1913 value of the stock, before she brought suit for any overpayment made in 1920. The voluminous record in the case before the Board demonstrates this. *Couzens's* case, 11 B. T. A. 1040. With the two remedies open and the two causes of action present, the course she selected was the obvious one to take. And it must be remembered that the rule of the cases was then clear that a suit against the Collector did not bar a suit against the United States. *Sage v. United States*, 250 U. S. 33, was decided in 1919 and its authority had not been challenged up to the date of taxpayer's letter. The course she took was then clearly justified under the law.

But surely the law does not say that if she sued the Collector on one separate demand she has given up the other. It says only that the issues litigated in the first suit cannot be litigated again in the second suit. The question then is whether the causes of action are the same in both cases. We believe we have demonstrated that they are not.

VI.

The rule of Res Judicata does not bar this suit or conclude the taxpayer's contentions.

The Government argues that the taxpayer is barred in this action by the rule of res judicata, asserting that "the earlier litigation dealt with the basis of the Ford stock and the refund sought herein turns on the basis for the identical shares" (p. 32).

This point of res judicata was not presented to the District Court or to the Circuit Court of Appeals. It was suggested for the first time in the petition of the Government for the writ of certiorari. It is closely related to the "merger" point which was specifically abandoned by the Government. We respectfully suggest the Government's contention in respect to it should not now be considered. (See supra 43.)

The assertion that the earlier suit dealt with the basis of the Ford stock and the refund sought herein "turns on the basis for the identical shares," while incorrect as applied to the separate issues and separate claims in the two suits, still perhaps requires a brief statement as to the doctrine of res judicata.

There is no dispute but what the bar of this doctrine can be applied only when the two suits in question are between the same parties or their privies. If this situation is present, and we deny that it exists here, the next question to be considered is whether or not the second suit is on the same demand as was the first suit. If the second suit is on the same demand, then the judgment in the first suit is a bar to a subsequent action and is a finality as to the claim or demand in controversy not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter

"which might have been offered for that purpose." *Cromwell v. County of Sac*, 94 U. S. 351. In some of the cases it has been said that the rule extends to matters "which might have been raised" in the former suit. These words, said this Court in *The Haytian Republic*, 154 U. S. 118, must not be misconstrued. "* * * the doctrine is that the thing adjudged includes not only the direct results of the cause of action which the judgment concludes but also all those necessarily incident to and growing out of that cause which the parties might have joined in the suit." The limitation still remains that the bar cannot be claimed except as to matters which are necessarily incident to and growing out of the first cause.

But if the second suit is on a different demand, then the first judgment is conclusive on the parties only as to the point there actually litigated and determined. *Davis v. Brown*, 94 U. S. 423, 428; *Virginia-Carolina Chemical Co. v. Kirven*, 215 U. S. 252; *Radford v. Myers*, 231 U. S. 725. Issues which were involved in the first case but were not passed on by the Court in deciding it are not res judicata. *Hunter v. Hunter*, 63 S. C. 78, 90 Am. St. R. 663. In all such cases it must appear, before the bar falls, that the first judgment determined the actual question at issue between the parties in the second suit.

The Government's contention here must, therefore, meet the test as to whether this suit is between the same parties or their privies, as was the former suit. If it is not, then there is no res judicata. If it is between the same parties, or their privies, the first question is whether or not it is on the same demand as that litigated in the former suit. We have already made some reference to this question. We submit that the second suit is not on the same demand as the former suit. The former suit was for the jeopardy assessment of $2,627,309.05. The present suit is for an overpayment made by the taxpayer in 1920 of $195,710.44. As

already pointed out, the two claims are certainly different in amount and in the time of their accrual. But it has been said that it is a proper test of whether the second suit is on the same demand as the first suit "to consider whether the same evidence would sustain both." *The Haytian Republic*, 154 U. S. 118; *Water, etc. Co. v. City of Hutchinson*, 160 F. 41, 19 L. R. A. (N. S.) 219; *Harrison v. Remington Paper Co.*, 140 F. 385, 400. This has been declared to be the best test. *Rossman v. Tilleny*, 80 Minn. 160, 81 Am. St. R. 247; *Hodge v. Shaw*, 85 Iowa 137, 39 Am. St. R. 290. Certainly the proofs in the present case necessarily involve the determination of the true March 1, 1913 value of the Ford stock. The sole issue of fact is as to that value. Taxpayer's contention in the prior suit did not require proof as to the March 1, 1913 value of the Ford stock. The only question there litigated and determined was the authority of the Commissioner to revalue that stock.

In a note to the opinion of the Circuit Court of Appeals (26 F. [2d] 178) the situation is made clear. After the trial before a jury was entered upon, the defendant admitted the truth of everything well pleaded in the declaration but this "concession did not include any statement of the actual 1913 value of the stock, if such statement there was." The Court then proceeded to direct a verdict on three grounds: (a) that the fixing of the value by the Commissioner and the sale of the stock in reliance thereon raised an estoppel in favor of the taxpayer; (b) that the original assessment and its later approvals established the value fixed beyond the power of the Commissioner, except for good cause—to reopen; and (c) that the deficiency assessment was void for lack of jurisdiction. There is in this no issue as to the March 1, 1913 value. In the Circuit Court of Appeals the Court planted its affirming decision on the second ground. It did not discuss the actual March

1, 1913 value of the stock. The scope of its finding is clearly indicated in these words in the opinion (p. 181):

> "For these and other considerations we conclude that authority to review and revise such a valuation as this for fraud, mistake, or analogous ground is reasonably to be implied from the statutes, while power thus to repudiate the former action, merely because the comissioner has changed his view (or his predecessor's) of the evidence, is not reasonably implied."

The "other considerations" had naught to do with any issue on the March 1, 1913 value.

The statement in the Government brief that "the earlier litigation dealt with the basis of the Ford stock" is, therefore, not correct in any sense pertinent to the rule of res judicata. The demands in the two cases are different and the issues litigated and to be litigated in the two cases are different.

However, if it should on any theory be said that the cause of action in the present case is the same as the cause of action in the first case, then the question would arise as to whether or not the March 1, 1913, value of the Ford stock was litigated and adjudged in the case brought to recover the jeopardy assessment, or was a "thing that was necessarily incident to and growing out of" that case so that the parties might have joined it in that suit. We paraphrase the words of the opinion in *The Haytian Republic* case, supra. Certainly, as we have pointed out, the base value of the Ford stock was not directly there determined. Nor was that value a necessary incident of that suit or its judgment. All that the taxpayer was required to establish in that suit, in order to sustain her claim, was that the Roper valuation must stand. She could not under the pleadings or the law have been accorded a judgment in excess of the amount of the deficiency assessment and so had no inter-

est in the actual March 1, 1913 value. There was no issue in the case which required her to prove the actual March 1, 1913 value of the stock. She would not have been permitted to show it for the reason that the sole question presented was whether or not the Roper value of $9,489.34 must stand.

Measured then by the rule that if the claims in the two suits are the same, the bar applies not only to the matters that were litigated but as to those which were necessarily involved or those which could have been properly adjudged in the former case, the Government's contention here must fail. The actual March 1, 1913 value of the Ford stock (this is the matter in issue in the present case) was not determined in the prior case and was not necessarily incident to that case and its adjudication.

It, therefore, becomes of no importance to determine whether the parties in the two cases are the same. In any event, the "thing adjudged" in the prior case is not the thing to be adjudged in this case.

Counsel, however, argue insistently that the parties in the two suits are the same and that *Sage v. United States*, 250 U. S. 33 (1919), which holds otherwise, is no longer the law,* or at least that the rule of that case "is distinguishable in several important respects." With this we do not agree.

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*It is argued that the common law suit against the Collector has been converted into a statutory remedy, citing *Cary v. Curtis*, 3 How. 236. The language quoted, p. 37, is from *Arnson v. Murphy*, 109 U. S. 238 (1883). *Cary v. Curtis* is now of at least questionable authority for it was pointed out in the *Smietanka* case, 257 U. S. 1, 4:

> "As the law stood before later statutes a collector was liable personally for duties mistakenly collected, * * *. But, after an Act of Congress had required collectors to pay over such monies, it was held, *against the dissent of Mr. Justice Story*, that the personal liability was gone. *Cary v. Curtis*, 3 How. 236. Later statutes however recognize suits against collectors in such cases, and the plaintiff contends that they should be construed to create a new statutory liability attached to the office and passing to successors. * * *. This, however, is not the language of the statutes and *hardly can be reconciled with the decision of this Court* in *Sage v. United States*, 250 U. S. 33, and other cases to which we shall refer." (Italics supplied.)

The doctrine of the *Sage* case has been consistently followed by this Court and has been cited with approval in numerous cases in the lower courts. It has been repeatedly relied on by the Solicitor General to protect the rights, or further the interests, of the Government. It was cited with approval in *Smietanka v. Indiana Steel Co.*, 257 U. S. 1 (1921). It was approved in *Graham & Foster v. Goodcell*, 282 U. S. 409, 430 (1931). In *Bankers Coal Co. v. Burnet*, 287 U. S. 308, 312 (1932) it was expressly held that the judgment in the suit against the Collector was "not res adjudicata against the Commissioner or the United States." Both it and the *Bankers Coal Co.* case were cited with approval in *Tait v. Western Maryland Railway Co.*, 289 U. S. 620 (1933). The *Tait* case was argued on the 12th of May, 1933 and decided on May 29, 1933. On April 19, 1933 the case of *George Moore Ice Cream Co. v. Rose*, 289 U. S. 373 was argued. It was decided May 8, 1933. The opinion in the *Moore Ice Cream Company* case should, therefore, be read in connection with the opinion in the *Tait* case, decided by a unanimous court exactly three weeks later. *Bankers Coal Co. v. Burnet* had only recently been handed down on December 5, 1932. Its opinion was also by a unanimous court. The *Moore Ice Cream Company* case is referred to by opposing counsel as "this Court's more thorough and more recent consideration of the nature of the suit against the Collector * * *." It is, of course, more recent than the *Sage* case. But it is not more recent that the *Tait* case which specifically approved the doctrine of the *Sage* opinion.

In the *Moore Ice Cream Company* case, the taxpayer had made a payment of its taxes without protest in 1923 when the law still required as a condition of the collection of a refund that the payment be made under protest. The requirement persisted until 1924, when it was abolished. The taxpayer brought its suit in 1931. The Government contended

that the rule requiring a protest survived if the payment was before the amendment. The taxpayer contended that the new rule applied to all suits begun after the adoption of the amendment even though the payment had been made theretofore. The Court held that it was the intention of Congress to remove the requirement of protest in any suit brought after the amendment irrespective of the date of the underlying payment. The Court derived this intention of Congress not only from the language of the statute but from its "history and aims." It said in substance: the Government was unjustly enriched when it "held on to moneys which had been illegally collected either with protest or without." (Opinion p. 378); the requirement of protest had not been limited to suits against a Collector but extended also to suits against the Government; so when Congress amended the statute to strike out the necessity for a protest it drew no distinction between suits against the Government and suits against a public officer; it made them subject to a common rule and made no discrimination between payments that had been made "and those to come." The Court later pointed out that the defendant Collector acted under the direction of a superior officer and his duty being imperative, he was protected by the command of his superior and was entitled as of right to a certificate converting the suit against him into one against the Government. His position could be no better if there had been a protest at the time of payment. Here the Court comes to the statement quoted by Counsel for the Government:

> "In such circumstances his presence as a defendant is merely a remedial expedient for bringing the Government into Court."

Summing up the argument as to the constitutionality of the statute, the Court pointed out that there had been no change in it as to the Collector. The remedy had been enlarged against the Government but the subordinate official who is

> "brought before the court as a formal party only will not be heard to object that there has been a denial of due process in enlarging the liability to be borne by some one else."

Granted that permission to sue the defendant Collector is merely a remedial expedient for bringing the Government into court, the so-called "relic of bygone modes of thought," i.e., the suit against the Collector, is still one of the remedies open to the taxpayer.* Justice Cardozo's language does not go so far as to say that a suit against a Collector is identical with a suit against the Government. When in the earlier portion of the opinion, it was said (page 379):

> "It did not draw a distinction between suits against the body politic and suits against a public officer who was to be paid out of the public purse. It put them in a single class, and made them subject to a common rule."

it must have been the thought of the Court that the suit against the Government and the suit against the Collector were not really one and the same. The Court could have said that no distinction could be drawn between suits against the Government and those against the Collector because they were in reality suits against the same parties. It did not do so.

The Circuit Court of Appeals of the Sixth Circuit in *Toledo Edison Co. v. McMaken*, 103 F. (2d) 72 (1939) refused to interpret the *Moore Ice Cream Company* case as overruling the *Sage* case.

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*Mr. Justice Cardozo used this language in the course of an argument (p. 379), which rested on the "fine sense of honor" of the United States in renouncing "an advantage that was felt to be ignoble" and laid down a rule for the benefit of the taxpayer. He did not consider the possibility that the Government would later use his words to prevent the litigation by the taxpayer of an issue which under the law as it stood when she brought her first suit against the Collector could be reserved for a suit against the Government.

This Court had an opportunity to overrule or criticize the doctrine of the *Sage* case in *Anniston Mfg. Co. v. Davis*, 301 U. S. 337 (1937). It did not take it. The suit was against the Collector. The statutes had withdrawn the remedy of a suit against him. The taxpayers nevertheless brought suit and argued that they had a vested right of action against the collector to hold him to account and that the new remedies which the Act gave were not the equivalent of the right taken away. They contended that the suits they sought to maintain were really

> "personal suits against the defendant, at common law, to enforce vested rights against him as an individual, and not suits against the United States, consented to by it through the fiction of a suit against the Collector."

The Court of Appeals held the suits were not personal, common law actions but statutory actions for a refund in which the appellee is not a real but only a nominal or fictional defendant and distinguished *Sage v. United States* and other related cases.

The opinion of the Supreme Court includes no statement as to whether there was any identity between the suit against a Collector and a suit against the United States and did not discuss the question of whether a suit against the Collector was really a personal suit at common law. It apparently brushed that distinction aside, concluding (p. 357) that the procedure authorized by the statute and substituted for the suit against the Collector provided

> "for the protection of all the legal rights of the petitioner including any constitutional right which it may be entitled to invoke with respect to the refund which it seeks."

It affirmed the dismissal by the Court of Appeals "*but upon the ground stated in this opinion.*" (Italics ours.)

It cannot be said that this case impairs in any way the ruling of the *Sage* case.

The *Sage* case was again referred to in *Lowe Bros. Co. v. United States,* 304 U. S. 302, and in connection with the *Moore Ice Cream Company* case, the Court holding that a suit against the United States would not lie in the District Court to recover taxes in excess of $10,000 unless the overpayment was collected by a Collector who, when the suit was begun, was dead or out of office.

In the still later case of *Sunshine Coal Co. v. Adkins,* 310 U. S. 381 (1940), the Court had an opportunity to express itself on the *Sage* case but was content only to distinguish it and thus indirectly to again endorse its doctrine. Sunshine Coal Company applied to the National Bituminous Coal Commission to be exempted from a tax on the ground that its coal was not bituminous coal. The Commission held otherwise. The order was reviewed in the Circuit Court of Appeals and affirmed. It was there decided that the Company's coal was in fact bituminous. The taxes had been demanded and a temporary injunction was issued to prevent their collection. Adkins, the Collector, then took the position that the decision in the earlier case against the Coal Commission was res judicata as to the status of the Company's coal and that, therefore, the Court had no jurisdiction to entertain the second suit. When the matter came to the Supreme Court, that Court held (page 402) that the taxpayer was seeking to raise the identical issue raised in the former suit

> "since its purpose is to enjoin collection of the self-same tax."

It then pointed out that where the issues in separate suits were the same, the fact that the parties were not identical was not necessarily fatal:—

> "A judgment is *res judicata* in a second action

> upon the same claim between the same parties or those in privity with them."

and the opinion continues (page 403):

> "The crucial point is whether or not in the earlier litigation the representative of the United States had authority to represent its interests in a final adjudication of the issue in controversy. Cf. *Gunter v. Atlantic Coast Line R. Co.*, 200 U. S. 273, 284-289. Cases holding that a judgment in a suit against a collector for unlawful exaction is not a bar to a subsequent suit by or against the Commissioner or the United States (*Sage v. United States*, 250 U. S. 33; *Bankers Pocahontas Coal Co. v. Burnet*, 287 U. S. 308) are not in point, since the suit against the collector is 'personal and its incidents, such as the nature of the defenses open and the allowance of interest, are different.' *Sage v. United States*, supra, p. 37. But here the authority of the Commission is clear. There can be no question that it was authorized to make the determination of the status of appellant's coal under the Act. It represented the United States in that determination and the delegation of that power to the Commission is valid, as we have said. That suit therefore bound the United States, as well as the appellant. Where a suit binds the United States, it binds its subordinate officials. *Tait v. Western Maryland Ry. Co.*, supra."

This is certainly an express recognition that the rule of *Sage v. United States* still stands.

Counsel say (Br. 33) that

> "the important consideration was that the United States was the real party in interest in both suits * * *."

This is not correct. There were two real or essential points; first, the issue, as to the nature of the taxpayer's coal,—this was the same in both cases; and second, the fact that the party who first determined it had the power to bind the United States in such determination.

We find but four cases in which the doctrine of the *Sage* case has been criticized or limited. One is in the opinion of the District Court in *Western Maryland Ry. Co. v. United States* discussed supra (page 50); another is the opinion of the Fifth Circuit in the case of *Anniston Mfg. Co. v. Davis*, 87 Fed. (2d) 773 (see supra 64). The *Sage* ruling was not there criticized, but it was said, page 779, that it

> "must be read as applied to the situations specifically dealt with under those decisions and the matters decided in them."

The Supreme Court, as we have pointed out, did not follow the lower Court in this respect. The Sage case was distinguished by the District Judge in *Cudahy Packing Co. v. Harrison* (Ill.) 18 F. Supp. 250 (1937), and again distinguished and limited in *Hammond-Knowlton v. United States*, (C. C. A. 2nd, 1941), 121 F. (2d) 192. It was approved in *United States v. Nunnally Investment Co.*, 36 F. Supp. 332, certiorari denied May 26, 1941.

The Government's brief argues that the *Sage* case is further distinguishable on the ground that whatever distinctions existed at the time of that decision in suits against the United States and suits against the Collector have since disappeared, asserting that the distinction so far as interest is concerned has since been eliminated by the statute and that now a Collector would be entitled to a certificate of probable cause and concluding that it is difficult to determine what the difference is "in the nature of the defenses open"; that while there may be certain formal differences between the two types of suits, there are no differences of any substance. But there are substantial differences in the incidents of a suit against the United States and of a suit against the Collector.

In a suit against a Collector in a United States District Court, the plaintiff taxpayer has a right to a jury trial

and an absolute right of appeal to the Circuit Court of Appeals. If the taxpayer brought suit in the Court of Claims against the United States, there is no absolute right of appeal and there is no constitutional right to a jury trial. *McElrath v. United States*, 102 U. S. 426. The District Court sitting in a suit brought against the United States sits as the Court of Claims. In suits in the District Court, brought under the Tucker Act, jury trials are expressly prohibited. U. S. C. A. Title 28, Sec. 41 (20).

A claim against a Collector has been held to be assignable. *Burke v. Davis*, 63 F. 456; *Masonic Country Club v. Holden*, 12 F. (2d) 951. Claims against the United States before allowance are not assignable. U. S. C. A., Title 31, Sec. 203.

There are special statutory provisions regarding allegations of allegiance applicable to suits in the Court of Claims. The State Conformity Acts apply in procedural matters in suits against the Collector but do not in suits against the United States.

Costs are recoverable as a matter of right against a defendant Collector, *DeBary v. Carter*, (C. C. A. 5th) 102 F. 130; Cf. *Treat v. Farmers Loan & Trust Co.*, (C. C. A. 2nd) 185 F. 760,—not so if the suit is against the United States. U. S. C. A., Title 28, Sec. 258; *United States v. Chemical Foundation*, 272 U. S. 1, 2[illegible]; *United States v. Worley*, 281 U. S. 339, 344; *Corn Exchange Bank v. United States*, (D. C., S. D., N. Y.) 51 F. (2d) 508.

It is clear there are still essential differences between a suit against the Collector to recover an income tax erroneously assessed and collected and a suit against the United States for the same purpose. The doctrine of the *Sage* case still has vitality.

The *Sage* case was decided in 1919. Taxpayer's suit on the jeopardy assessment was begun in December, 1925.

In the interval the Court had handed down the *Smietanka* case in 1921. The Second Circuit in *Fox v. Edwards*, 287 F. 669 (1923) had cited the *Sage* case and emphasized the three distinct remedies given to the taxpayer and had quoted it in *New York Life Insurance Co. v. Anderson*, 263 F. 527 (1920). It had been cited in the Eighth Circuit, *Coffey v. United States*, 296 F. 807 (1924), and by the Western District of Pennsylvania in *Harrison v. Lewellyn*, 28 F. (2d) 990 (1928). It was not until eight years after commencing suit on the jeopardy assessment that the *Moore Ice Cream Company* case suggested that suits against Collectors for overpayments of income taxes were anachronisms or relics of bygone modes of thought. We respectfully suggest that the taxpayer should not now be penalized for planning her course in strict conformity with the law as it stood when she sued Collector Woodworth and still protected and pressed in the Department her claim for refund for the 1920 overpayment of the original tax, appreciating always that Collector Grogan being dead, her suit for an overpayment to him would be against the United States.

CONCLUSION

By reason of all the foregoing, the respondent contends that the decision of the court below should be affirmed.

Respectfully submitted,

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APPENDIX

Statutes and Treasury Decisions Involved

Section 252 of the Revenue Act of 1918.

> "That if, upon examination of any return of income made pursuant to this Act, the Act of August 5, 1909, entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' the Act of October 3, 1913, entitled 'An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes,' the Revenue Act of 1916, as amended, or the Revenue Act of 1917, it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: Provided, That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer."

Section 3226 Revised Statutes as amended by Section 1103, Revenue Act of 1932, and as amended by section 807, Revenue Act of 1936.

> "No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal

Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates. Any consideration, reconsideration, or action by the Commissioner with respect to such claim following the mailing of a notice by registered mail of disallowance shall not operate to extend the period within which suit may be begun."

T. D. 4266 C. B. VIII-1 page 111.

Treasury Department

Office of Commissioner of Internal Revenue

Washington, D. C.

To all Collectors of Internal Revenue and
Others Concerned:

(1) Except as provided in paragraph (2), a refund or credit of any internal revenue tax will not be allowed in any case after the expiration of the statutory period of limitation applicable to the filing of a claim therefor (computed without regard to the filing of any so-called informal or defective claim) unless prior to the expiration of such period a formal claim has been duly filed which complies with all the requirements of the regulations applicable at the time such claim was filed, nor will any claim which does not comply with such regulations be considered for

any purpose as a claim for refund or credit. (See e.g. Reg. 14; art. 1036, Reg. 45 and 62; art. 1306, Reg. 65; art. 1304, Reg. 69; art. 1254, Reg. 74; Law Opinion 1116 [C. B. III-1, 350]; T. D. 4265 [page 110, this Bulletin].)

(2) A refund or credit may be allowed after the expiration of such statutory period of limitation, even if no formal claim has been filed prior thereto, in any case in which a so-called informal or defective claim, duly filed prior to the expiration of such period and stating specifically the grounds for the refund or credit, is perfected by the filing of a claim prior to May 1, 1929, which complies with the requirements of Treasury Decision 4265, but (a) only the grounds set forth in such formal claim which were also set forth in such informal or defective claim will be considered, and (b) no claim in respect of which a suit in court has been commenced at any time may be so perfected.

D. H. Blair,
Commissioner of Internal Revenue.

Approved March 27, 1929.

A. W. Mellon,
Secretary of the Treasury.

SUPREME COURT OF THE UNITED STATES.

No. 35.—October Term, 1941.

United States of America, Appellant, *vs.* Alice Gray Kales.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[December 8, 1941.]

Mr Chief Justice Stone delivered the opinion of the Court.

Two questions are presented for decision by the record in this case. First, was a letter written to the tax collector by respondent taxpayer and lodged with the Commissioner a claim for refund of overpaid taxes so as to stop the running of the statute of limitations against the claim? Second, did a judgment refunding taxes paid to the collector in 1925 upon profits from the sale of certain shares of stock in 1919 bar a later suit for a further recovery of 1919 taxes overpaid in 1920 to a different collector upon profits from the same transaction?

In 1919 respondent was the owner of 525 shares of the stock of the Ford Motor Company which she had acquired before March 1, 1913. In anticipation of the sale of the stock she requested and obtained in 1919 from the Commissioner of Internal Revenue a ruling that the March 1st, 1913 value of the stock was $9,489 per share. She then sold the stock for $12,500 a share and reported in her income tax return for 1919 the profit over the March 1, 1913 value thus established. In 1920 she paid the tax so computed, amounting to $1,216,086, to Collector Grogan, since deceased.

In March, 1925, the Commissioner made a jeopardy deficiency assessment against respondent for an increase of profit on the sale of the stock in 1919, on the ground that respondent had overstated the 1913 value of the stock in her 1919 tax return. Respondent paid the additional assessment, amounting to $2,627,309, to Collector Woodworth on March 24, 1925. At the same time she lodged with the collector and the Commissioner a written protest, dated March 23, 1925, against the jeopardy assessment on the ground,

among others, that the Commissioner was without authority in law to reopen and set aside the 1913 valuation of the stock as determined in 1919 by the then Commissioner, on the basis of which respondent had sold her stock. By paragraph 9 of the protest respondent also advised the collector, the Commissioner and the Government, that while it was respondent's position that the deficiency assessment was illegal and void for this and other reasons stated, if the Internal Revenue Department, the Board of Tax Appeals or any court having jurisdiction should hold that the assessment of March 1, 1913 value of her stock, made in 1919, should be vacated, set aside, reopened or reversed, then respondent would insist that the valuation fixed by the Commissioner in 1919 was less than the fair market value as of March 1, 1913, that the 1919 tax which she had paid in 1920 was correspondingly excessive and that she should recover the tax to the extent of such excess when the fair value had been determined. She added in paragraph 10 that "if for any reason a revaluation shall be had", she "will insist" that the stock was greatly undervalued by the Department and "will claim the right to a refund" of the excess tax collected.

After a claim duly filed for refund of the amount of the jeopardy assessment, paid in 1925, respondent brought suit in the district court against Collector Woodworth, which resulted in a judgment for the taxpayer for the full amount of the assessment with interest. The Circuit Court of Appeals for the Sixth Circuit affirmed the judgment, *Woodworth* v. *Kales*, 26 F. 2d 178, which was satisfied in November, 1928.

September 24, 1928, respondent filed a formal claim for refund of the taxes paid in 1919, stated to be an amendment of the claim for refund contained in her letter of protest of March 23, 1925. By the amendment respondent sought an additional refund of income taxes, paid for the year 1919, in the amount of $195,710 with interest, upon the ground that the Ford stock, as the Board of Tax Appeals had then determined in *James Couzens*, 11 B. T. A. 1040, had a March 1, 1913 value of $10,000 per share, and that she should accordingly have the benefit of this higher basis in computing her profit. At a hearing granted by the General Counsel for the Bureau of Internal Revenue on June 13, 1929, the amended claim was considered on the merits. Again in January, 1933, a member of his staff, at a conference with respondent's attorney, advised the latter that the informal claim was filed in time and was good as an informal claim.

By letter of June 4, 1935, however, the Commissioner declined to act upon it, on the single ground that because respondent's judgment for refund of the jeopardy assessment for 1919 taxes had been satisfied "the Bureau is precluded from giving further consideration in any respect to the matter of your income tax liability for the taxable year 1919." This was followed by the Deputy Commissioner's letter of August 20, 1935 to respondent, stating that "the refund claim filed in 1925 was merged into the judgment . . . and you were, therefore, precluded from filing an amendment to the earlier claim which had been finally adjudicated." The letter added "The adjudication by the court removed this matter from the realm of administrative action other than to make refund as directed by the judgment."

Collector Grogan having retired from office and having died, the present suit for refund of the overpayment of the tax claimed was brought in the district court against the United States under the provisions of § 1122(c) of the Revenue Act of 1926. This section authorizes suits in the district court for the refund of overpayment of revenue taxes even if in excess of $10,000 to be brought against the United States where the collector to whom the overpayment was made is dead or is not in office when the suit is brought. The judgment of the district court dismissing the suit on motion was reversed by the Circuit Court of Appeals, 115 F. 2d 497, which held that the letter of March 23, 1925, was a timely informal claim for refund which had been perfected by the formal amended claim filed in September, 1928, that consequently the respondent's cause of action was not barred by limitation and that recovery was not precluded by the previous judgment for recovery of the jeopardy assessment for 1919. We granted certiorari, 313 U. S. 553, upon petition of the Government, which urged that any further recovery for overpayment of the 1919 tax was barred by the judgment in the respondent's suit and recovery of the jeopardy assessment for that year, a question of importance in the administration of the revenue laws. The Government urges as grounds for reversal that if respondent's letter of March 23, 1925 be considered a claim for refund any recovery is barred by the 1928 judgment, and that in any event the letter was not a claim for refund and does not support the present suit.

First: Concededly recovery of the 1919 tax, paid in 1920, is not barred by limitation if respondent's letter of March 23, 1925,

be treated as a claim for refund. The Collector of Internal Revenue extended the respondent's time to make return of her 1919 income taxes for thirty days from March 15, 1920, and her letter was placed with the Commissioner within five years of the expiration of the extended time. Section 284(h) of the 1926 Revenue Act, 44 Stat. 9, provides that a claim for refund of 1919 taxes shall not be barred by a lapse of time if filed within five years from the date when the return was due. Revised Statutes § 3226, 26 U. S. C. § 1672, makes the filing of a claim for refund in accordance with the law and Treasury regulations a condition precedent to suit to recover it. Article 1306 of Treasury Regulation 65, promulgated under the 1924 Revenue Act and applicable here, provides that claims for refund shall be made upon Form 843, setting forth all the facts relied on under oath. But Treasury Decision 4266, promulgated March 27, 1929, authorizes the Commissioner to make a refund after the expiration of the statutory period of limitation, even though no formal claim has been filed before that time, in any case in which an informal or defective claim, duly filed prior to the expiration of the period of limitation and stating specifically the grounds for the refund, is perfected by the filing of a claim prior to May 1, 1929.

This Court, applying the statute and regulations, has often held that a notice fairly advising the Commissioner of the nature of the taxpayer's claim, which the Commissioner could reject because too general or because it does not comply with formal requirements of the statute and regulations, will nevertheless be treated as a claim where formal defects and lack of specificity have been remedied by amendment filed after the lapse of the statutory period. *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62; *United States* v. *Factors & Finance Co.*, 288 U. S. 89; *Bemis Bro. Bag Co.* v. *United States*, 289 U. S. 28; *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 384. This is especially the case where such a claim has not misled the Commissioner and he has accepted and treated it as such. *Bonwit Teller Co.* v. *United States*, 283 U. S. 258; *United States* v. *Memphis Cotton Oil Co.*, *supra*, 70.

In applying these guiding principles to the case in hand it is necessary to read the letter of March 23, 1925, in the light of the peculiar circumstances then well known to the Commissioner and referred to in the letter. The letter dealt with two distinct subjects. One was the jeopardy assessment which the taxpayer was

to pay and did in fact pay to the collector on the following
hen the letter in duplicate was given to the collector and the
issioner. The other, stated in paragraphs 9 and 10 of the
related to the liability of the Government for overpayments
9 taxes made to Collector Grogan in 1920 in the event that
ommissioner's 1919 assessment of the Ford stock should be
de by the courts or administrative action. In that event the
recites that the 1919 valuation was too low, the tax paid in
was too high, and asserts the taxpayer's consequent "right to
nd of said tax to the extent of such excess."

letter states correlative alternative rights on which the
ver relied. One was the challenge to the validity of
925 jeopardy assessment on the ground that the appraisal
19 of the then Commissioner was unalterable. The other
espondent's right to a refund of taxes paid in 1920 in
ent that the 1919 appraisement of the stock should be set
by the Bureau or be determined to be erroneous. Whether
ommissioner would insist upon changing the 1919 appraisal
ock, and whether in any case the Board of Tax Appeals
find a different 1913 value for the stock, were matters for
determination. When respondent filed her letter the time
which a claim for refund could be filed was about to expire,
he occurrence of the contingencies on which a recovery could
l by respondent remained uncertain. But the Commissioner
have been left in no doubt that she was setting forth her right
efund in the event of a departmental revision of its 1919
ion of her stock. Her letter was present notice that if the
tment insisted upon changing its original decision as to
913 value, she asserted that the stock had been undervalued
consequence of the undervaluation she had a "right to a
d of said [1919] tax to the extent of such excess". Her con-
g paragraph made the like assertion "if for any reason a
ation shall be had" of the Ford stock. At that time the
issioner had assessed deficiencies aggregating $31,069,000
t former Ford stockholders who had sold stock which they
quired before March 1, 1913. *See James Couzens*, 11 B. T. A.
. Respondent's amended formal claim of September 11,
only made more specific the allegations of her earlier in-
l claim by stating that the Board of Tax Appeals had found
913 value of the stock to be $10 .) per share and by com-

puting the excess tax, the right to which had been asserted in the earlier claim.

The fact that respondent had originally stated her claim in the future tense, saying that in the event of departmental revision of the valuation of the stock she "will insist" on a higher valuation and "will claim the right to a refund", does not in the circumstances of this case lend even grammatical support to the Government's contention. Such a use of the future tense in stating a claim may, with due regard to the circumstances of making it, rightly be taken as an assertion of a present right. See *Georgia, Florida & Alabama Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190, 197-8; cf. *Moore Ice Cream Co.* v. *Rose*, *supra*, 384, reversing 61 F. 2d 605. Here the claim is alternative and contingent upon future events. The statement that upon the happening of the contingency the claim will be prosecuted is not inconsistent with the present assertion of it. It is indeed an appropriate, if not the necessary phraseology for the present assertion of an alternative claim with respect to which a taxpayer in his presentation of an informal tax refund claim, should be in no less favorable position than the plaintiff in a suit at law who is permitted to plead his cause of action in the alternative. See Rule 8(e) of the Federal Rules of Civil Procedure; *United States* v. *Richards*, 79 F. 2d 797.

If the point were more doubtful than we think it is, it would be resolved by the consistent administrative treatment of respondent's letter of March 23, 1925, and the later amendment as a claim for refund. Neither the original nor the amended claim has ever been rejected as inadequate by the Commissioner or the Bureau. There has been no objection to the claim on the ground that it was informal, deficient in its content, or untimely. Acknowledgment of the letter of March 23, 1925 by the Commissioner referred to the jeopardy assessment, but made no mention of the asserted right to refund of taxes paid in 1920. After the amendment was filed in September, 1928, the claim was held under advisement by the Bureau for nearly seven years. As we have said, it was consistently treated in correspondence by the Bureau and at hearings during this period as a claim for refund. The Commissioner finally by his letters of June 4, 1935 and August 25, 1935, declined to consider the claim on the sole ground that it was no longer a subject of administrative action because "the refund claim filed in 1925 was merged into the judgment" for refund

of the tax paid on the jeopardy assessment. Not only do we think that this entire course of departmental action was an administrative construction of respondent's letter of March 23, 1925, conforming to our own interpretation of its words, but we think it was a waiver of the requirements of the regulations as to the formality and particularity with which the grounds for refund are required to be stated. *Bowcit Teller & Co.* v. *United States*, supra, 264; *United States* v. *Memphis Cotton Oil Co.*, *supra*, 70; cf. *Tucker* v. *Alexander*, 275 U. S. 228, 231; *United States* v. *Garber Oil Co.*, 302 U. S. 528, 533.

Second: The Government argues that the right to recover for overpayment of income taxes in any tax year constitutes a single cause of action against the Government and that the present suit by the respondent, seeking recovery of 1919 taxes, after having recovered the amount of the jeopardy assessment for the same year involved an inadmissible splitting of her cause of action. In any event it insists that no cause of action for recovery of overpayment of 1919 taxes could survive the recovery of the amount of the jeopardy assessment, since the judgment for that recovery merged all claims for overpayment of 1919 taxes and so foreclosed the present suit for additional overpayments of taxes growing out of the same transaction.

But we think these contentions disregard the statutory scheme which has been set up for the recovery from an internal revenue collector, of taxes which he had unlawfully collected. See *Sage* v. *United States*, 250 U. S. 33. Originally payment under protest to an internal revenue collector of illegally exacted taxes gave rise to a common law cause of action against the collector for restitution of the overpayment. *Elliott* v. *Swarthwout*, 10 Pet. 137, 153, 156; *Moore Ice Cream Co.* v. *Rose*, *supra*, 375, and cases cited. By the protest the collector was informed of the contention of the taxpayer and was thus precluded from relieving himself, by payment into the Treasury of the moneys collected, from liability to make restitution. *Elliott* v. *Swarthwout*, *supra*; *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1, 4. By a series of Congressional acts it was made the duty of the collector to pay to the Government the moneys collected, regardless of a protest. 12 Stat. 442; 13 Stat. 483; R. S. § 3210; 26 U. S. C. § 1761. But with imposition of this duty on the collector to pay over, the Government undertook to indemnify him upon certification by the court

either that there was probable cause for the act done by the collector or that he acted under directions of the Secretary of the Treasury or other proper officers of the Government. 12 Stat. 741, § 1. In that event no execution was to issue against him but the amount of recovery was to be paid out of the Treasury. These provisions, carried into Revised Statutes § 989, are continued as 28 U. S. C. § 842. By § 1014 of the Revenue Act of 1924, 43 Stat. 253, 343, amending Revised Statutes § 3226, the requirement for protest of the payment was abolished.

While the effect of the certificate in indemnifying the collector has been said to convert the suit against him into a suit against the Government, at least so far as the ultimate incidence of the liability is concerned, *United States* v. *Sherman*, 98 U. S. 565, 567; *Moore Ice Cream Co.* v. *Rose*, *supra*, 381, the statutory provisions have not altered the nature and extent of the claims which the taxpayer is authorized to prosecute in suits against the collector. Originally it was the payment of the illegally exacted tax which gave rise to the cause of action. It was the payment which designated the person against whom the suit might be brought and which measured the right of recovery. Payments made to one collector could not be recovered from another, and since the causes of action against the two collectors were different recovery upon one could not bar recovery upon the other.

After the enactment of legislation requiring collectors of customs to pay over to the Government duties collected under protest, 5 Stat. 348; R. S. § 3010, doubts arose whether suit could, in such circumstances, be maintained against them, since it was thought that the statutory command had relieved the collectors from personal liability. See *Cary* v. *Curtis*, 3 How. 235. But those doubts were put at rest by later acts of Congress establishing the continued right of the taxpayer to maintain a suit against such a collector notwithstanding payment over of his collections to the Treasury. 5 Stat. 727, R. S. § 3011; *Curtis's Administratrix* v. *Fiedler*, 2 Black 461, 479; *Arnson* v. *Murphy*, 109 U. S. 238, 241. A like uncertainty as to the effect of the statutes requiring internal revenue collectors to pay moneys collected to the Government was resolved by this Court's decisions in *Philadelphia* v. *Collector*, 5 Wall. 720, 731; *Collector* v. *Hubbard*, 12 Wall. 1, 13. As Congress had enacted provisions for indemnification of the collector by the Government, the implication necessarily arose that

the taxpayer could maintain an action against him. See 12 Stat. 184, 729, 741; 13 Stat. 239.

The right of action thus continued is identical with that which existed before Congress had acted. Notwithstanding the provision for indemnifying the collector and protecting him from execution, the nature and extent of the right asserted and the measure of the recovery remain the same. It was payment to the collector which gave rise to the suit against him and limited the amount of the recovery. The judgment against the collector is a personal judgment, to which the United States is a stranger except as it has obligated itself to pay it. See *Sage* v. *United States, supra; Smietanka* v. *Indiana Steel Co., supra,* 4, 5.

While the statutes have for most practical purposes reduced the personal liability of the collector to a fiction, the course of the legislation indicates clearly enough that it is a fiction intended to be acted upon to the extent that the right to maintain the suit and its incidents, until judgment rendered, are to be left undisturbed. Among its incidents are the right to a jury trial, which is not available in suits against the United States. 28 U. S. C. 41(20).

By no possibility could the respondent in the suit brought against Collector Woodworth in 1925 recover taxes paid to Collector Morgan in 1920, which she demands here. Recovery from one collector of the payment to him does not bar recovery on the different cause of action arising upon payment to the other, even though the two collections are for taxes arising out of the same transaction. *Sage* v. *United States, supra; Bankers Pocahontas Coal Co.* v. *Burnet*, 287 U. S. 308; cf. *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 430; *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 403. The right to pursue the common law action against the collector is too deeply imbedded in the statutes and judicial decisions of the United States to admit of so radical a departure from its traditional use and consequences as the Government now urges, without further Congressional action.

Affirmed.

MR. JUSTICE JACKSON took no part in the consideration or decision of this case.